(1) 89-1275

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D.; JOSEPH DiLALLO, M.D.; PAUL R. FRANZ, D.C.; PHYLLIS LaFLAMME, R.N.; MARY C. MAJOR; and MARY ANN HAMBURGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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February 5, 1990

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QUESTIONS PRESENTED

1. Where the trial court judge so confused the case as to take a special verdict on negligence when negligence was uncontested, may New Jersey deny petitioners a remedy?

2. May New Jersey require the fortuitous appearance of a juror witness by "sheer luck" before it grants a remedy for jury misconduct?

LIST OF PARTIES

The parties to this proceeding are listed in the caption. Summary judgment dismissing the complaint against Paul R. Franz, D.C. was granted without opposition, and plaintiffs voluntarily dismissed suit against Phyllis LaFlamme, R.N., Mary C. Major and Mary Ann Hamburger prior to the plaintiffs'

appeal to the Superior Court of the State of New Jersey, Appellate Division. Thus, the remaining defendants in this matter are Robert I. Oberhand, M.D., and Joseph DiLallo, M.D.

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MISCELLANEOUS:

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The petitioners Rosella O'Grady and Frank O'Grady respectfully pray that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the above-entitled proceeding on April

20, 1989, affirming denial of petitioners' motion for a new trial in the Superior Court, Law Division, Union County.

OPINIONS BELOW

The order of the Supreme Court of New Jersey denying certification (Wilentz, C.J.) has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The opinion of the Superior Court of New Jersey, Appellate Division (per curiam) has not been reported. It is reprinted in the appendix hereto, p. 3a, infra.

The denial of plaintiffs' motion for a new trial by the Superior Court of New Jersey, Law Division (Weiss, J.S.C.) has not been reported. It is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

Petitioners filed their appeal in New Jersey Superior Court, Appellate Division, asserting, inter alia, that their rights under the due process clause of the fourteenth amendment to the Constitution of the United States had been violated. The appeal was argued on April 5, 1989. On April 20, 1989, their appeal was denied.

Petitioners sought certification from the Supreme Court of New Jersey. On September 8, 1989 their petition was denied.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) in that the Appellate Division of the Superior Court of New Jersey, the highest state court in which decision could be had, has denied their claim of right under the due process clause of

the fourteenth amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. CONST. art. I, para. 9.

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes

by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of a jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

NEW JERSEY RULES OF COURT INVOLVED

N.J. Ct. R. 1:16-1. Interviewing Jurors Subsequent to Trial.

Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to any matter relating to the case.

N.J. Ct. R. 2:10-1. Motion for New Trial as Prerequisite for Jury Verdict Review; Standard of Review.

In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall

not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

N.J. Ct. R. 4:9-2. Amendments to Conform to the Evidence.

When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the

trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

N.J. Ct. R. 4:25-1(b)(16). Pretrial Conferences.

When entered, the pretrial order becomes part of the record, supersedes the pleadings where inconsistent therewith, and controls the subsequent course of action unless modified at or

before the trial or pursuant to R. 4:9-2 to prevent manifest injustice. The matter of settlement may be discussed at the sidebar, but it shall not be mentioned in the order.

N.J. Ct. R. 4:49-1(a). Motion for New Trial: Grounds of Motion.

A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. On a motion for a new trial in an action tried without a jury, the trial judge may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly

appears that there was a miscarriage of justice under the law.

NEW JERSEY RULES OF EVIDENCE INVOLVED

N.J. Evid. R. 41. Evidence to Test a Verdict or Indictment.

Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

NEW JERSEY RULES OF PROFESSIONAL CONDUCT INVOLVED

N.J. RPC 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such

a person except as permitted by law.

NEW JERSEY MODEL
JURY CHARGE (CIVIL) INVOLVED

N.J. Model Jury (Charge) 7.11.
Proximate Cause--General Definition.

By proximate cause is meant that the negligence of the defendant was an efficient cause of the accident, that is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about. It is defined as a cause which naturally and probably led to and might have been expected to produce the accident complained of.

STATEMENT OF THE CASE

1. The Headache

In the early evening of Friday, March 4, 1983, petitioner Rosella O'Grady was in the kitchen of her home cleaning up after dinner, having just finished eating the evening meal with

her husband Frank, her daughter Lisa, age 12, and her son Frank, age 15, when she was suddenly overcome by the pain of an intense headache. 19T136-9 to -11.* Before the month was out, Mrs. O'Grady would suffer a subarachnoid hemorrhage that would leave her a conscious, mute quadriplegic, confined to the hospital, able to communicate only by eye movement. 20T193-15 to 194-10.

She said to her husband, petitioner Frank O'Grady, "I got a sudden unbelievable headache." 19T136-15 to -18. The

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* The trial transcript is cited herein as T with the date of the proceeding prepended. "19T136-9 to -11" indicates proceedings of the second day of trial, March 19, 1987, page 136, lines 9 to 11. Trial was had in the Superior Court of the State of New Jersey, Law Division, before the Honorable Lawrence Weiss, J.S.C., sitting with a jury, on March 18-20 and 20-27, 1987. A motion for a new trial was heard and denied by Judge Weiss on April 24, 1987.

pain confined her to bed for the remainder of the weekend. 19T136-20 to 19T137-1.

On the morning of Monday, March 7, 1983, Mrs. O'Grady went to the office of Robert I. Oberhand, M.D., an otolaryngologist who had treated her over a course of time for sinus and allergies. 19T138-17, 139-16, 139-17. Dr. Oberhand examined Mrs. O'Grady's nose, throat and larynx, tested her neck extension, and palpated her back muscles. 19T62-23 to 19T63-2. He took little or no history. He diagnosed Mrs. O'Grady's problem as otolaryngological, gave her a cortisone injection into the tissues of her nose, a prescription for an antibiotic and instructions to return in one week. 19T63-4 to -7. Dr. Oberhand also

reiterated a previous recommendation that Mrs. O'Grady undergo a submucosal resection to correct a deviated septum, which he believed might be contributing to her disorder. During the week following, the headache persisted.

On Monday, March 14, 1983, Mrs. O'Grady returned to Dr. Oberhand. Dr. Oberhand examined Mrs. O'Grady's ears, nose and throat again, and took her blood pressure, which was slightly elevated (134/94). 19T66-14 to -21. He now concluded that the headache probably related to some spinal muscle or joint problem, outside his specialty, and wrote a referral letter to Mrs. O'Grady's internist, defendant Joseph DiLallo, M.D., which in part said:

Mrs. O'Grady is presently

> complaining of severe, disabling headaches. Pain begins at the base of the skull, and radiates over the top of her head to her forehead. She also has some pain in her cheeks. She has pain radiating down the cervical spinal area posteriorly. She is under treatment by a chiropractor for diffuse spinal problems.
>
> Sinus x-rays have been ordered, and the results are pending. I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal, I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will recheck her hearing in two months.

Oberhand Letter, Appendix p. 17a, infra.

Dr. DiLallo was not to see Dr. Oberhand's letter in time to do anything about Mrs. O'Grady's condition: an employee of Dr. DiLallo filed the letter before he could read it. 25T112-10 to -13.

On the afternoon of Wednesday, March 16, 1983, 12 days after the onset of the headache, it disappeared as suddenly as it had come. 19T147-1 to -4.

Fifteen days later, on March 31, 1983, Mrs. O'Grady suffered a massive subarachnoid hemorrhage that left her a conscious, mute quadriplegic. She has been hospitalized continuously since that day.

Mrs. O'Grady exhibits emotional and intellectual presence, and is able to communicate through a slow and tedious system of spelling out words and sentences by eye movement, using a letter board.

The petitioners believe that Mrs. O'Grady suffered a prodromal (L. prodro-

mus, "precursor") or "sentinel" subarachnoid bleed from an aneurysm at the first branching of her right middle cerebral artery, which aneurysm burst on March 31, 1983. Prodromal bleeds cause sudden painful headaches unlike any other headache which the patient has experienced. See, e.g., Ball, Pathogenesis of the "Sentinel Headache" Preceding Berry Aneurysm Rupture, 112 Canadian Med. A.J. 78-79 (1975). Properly done, an angiogram gives an almost unequivocal picture of all but the tiniest aneurysms. C. Rumbaugh, D. Kido & R. Baker, Cerebral Angiography: Technique, Indications and Hazards, in 1 Angiography 219 (H. Abrams ed. 3d ed. 1983).

Respondent Dr. Oberhand contended

that Mrs. O'Grady's headache was caused by one of a variety of medical conditions other than prodromal bleeding. Respondent Dr. DiLallo contended that even if he had been timely shown the referral letter, he would have taken no action.

2. The Subarachnoid Hemorrhage and its Results

On March 31, 1983, while shopping at Sears for a pair of ski pants, Mrs. O'Grady collapsed, and was taken unconscious to Muhlenberg Hospital in Plainfield, New Jersey. 19T149-4 to -6, -12 to -15. She was found to have suffered a subarachnoid hemorrhage. Mrs. O'Grady remained at Muhlenberg for approximately three and one-half months, during the first two of which she

remained in a coma. 20T191-17 to 192-1.

On August 8, 1983, the petitioner was transferred to Runnell's Hospital in Berkeley Heights, New Jersey, where she has been ever since. 20T192-14 to -23.

Mrs. O'Grady's general health is good, but she has no control over bodily functions. She wears diapers. 20T196-18 to 197-1. Mrs. O'Grady has had a tracheostomy. 20T202. She is unable to eat solids and has a gastrostomy tube inserted in her stomach. 20T197-18 to -25.

Mr. O'Grady has visited his wife for several hours virtually every day since the accident. He has endeavored to ensure that the quality of his wife's care is maintained. However, because of budgetary pressures on the hospital, the

quality of that care has declined; bed sores have been allowed to form.

3. Questions from the Jury

Petitioners' jury trial began on March 18, 1987, in the Superior Court of New Jersey, Law Division, Union County, the Honorable Lawrence Weiss, J.S.C., presiding. At 3:05 p.m. on March 26, 1987, the jury retired. 26T228-12. Loud voices were heard from the jury room. At approximately 3:35 p.m., a note was passed to the judge, 26T231-2. O'Grady Affidavit, Appendix p. 19a, infra. The transcript is not clear: That note appears to have contained the first and second questions from the jury. A second note containing the third question was passed next. O'Grady Affidavit, Appendix p. 19a, infra. What

was described by the Judge as "Note Three," containing the fourth question, a redaction of the first, was passed at 5:28 p.m. 26T237-19, -20. A fourth note containing question five was passed shortly before the jury was sent home for the evening at about 5:45 p.m. 26T247-1; 26T247-11, -12.*

Question I

The jury asked, "In Dr. Oberhand's deposition did he say continuous headache for 12 days or does he say series of disabling headaches?" 26T231-2 to -6.

The request puzzled the court and counsel. Nothing in that portion of Dr. Oberhand's deposition read to the jury

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* Counsel's reconstruction. The record contains no mention of the second note containing the third question.

as part of petitioners' case in chief seemed to answer the question. The Judge refused to give the jury the Oberhand deposition (only part of which had been read to the jury), and asked for clarification of the question. 26T232-5 to -14, 233-9 to -16.

Question II

The jury asked, "Does P-7 in evidence refer to Mrs. O'Grady's headache?" Exhibit P-7 was a graph prepared by petitioners' expert Dr. Bennett M. Derby plotting headache intensity against time. The Judge answered this second question in the affirmative. 26T235-14 to 236-3.

Question III

The jury's third question does not appear on the record. It involved only

a brief interchange during the continuing colloquy among court and counsel over the meaning of Question I.

In this question, the jury requested the deposition of petitioner Mr. O'Grady. This deposition had been used in the cross-examination of Mr. O'Grady on the issue of when Mrs. O'Grady's headache ended. The Judge refused the jury's request. O'Grady Affidavit, Appendix p. 20a, infra.

Question IV

The jury asked, "Did Dr. Oberhand in his testimony state that the complaint was a continuous headache between the 7th and 14th of March of 1983?" 26T237-21 to -24. In response to this question, the Judge read back a portion of the Oberhand deposition.

26T245-2 to 246-24. It appears that what the jury wanted was a different passage in the transcript, consisting of a portion of the viva voce cross-examination of Dr. Oberhand by trial counsel for petitioners. 26T238-20 to 239-25, 240-16 to 241-5, 243-12 to 244-22.

Question V

In response to the Judge's question of whether the jury wished to continue deliberation, the jury responded that they wished to go home and asked the Judge: "Would you read these lines to us again tomorrow morning?" 26T247-12 to -13. The Judge said that he would, and the same portion of Dr. Oberhand's deposition which had been read in response to question four was read back

the following morning. In a little more than one hour, the jury returned a verdict of no cause. O'Grady's Affidavit, Appendix p. 20a, infra.

4. The Alternative Passage

Dr. Oberhand was heard twice by the jury. On March 19, 1987, trial counsel for petitioners, with the aid of a secretary, read into the record substantial portions of Dr. Oberhand's deposition as part of the petitioners' case. 19T30 to 19T79. On March 25, 1987, Dr. Oberhand appeared in his own defense, 25T5, and was cross-examined by counsel for the petitioners. 25T66 to 25T94.

Dr. Oberhand's viva voce testimony of March 25, 1987 is more responsive to the jury's inquiry in questions one, four and five than is the deposition

testimony which the Judge had read back to the jury on the afternoon of March 26, 1987 and the morning of March 27, 1987. The viva voce testimony was as follows:

> Q. Now, Doctor, Mrs. O'Grady's complaints of headaches were such that you felt that it was not part of the your specialty; is that correct?
>
> A. Not on the first visit.
>
> Q. But you came to that conclusion by the 14th?
>
> A. Yes, I did.
>
> Q. When we are dealing with the 14th; it is the same headache?
>
> A. Yes, sir.
>
> Q. The same type of headache; correct?
>
> A. Yes.
>
> Q. The same headache that hasn't gone away for the entire week; correct?
>
> A. No, because I mention the plural headaches.
>
> Q. Well, Doctor, do you have any notation in there of having inquired of Mrs. O'Grady whether or not the headache went away?
>
> A. No, I do not.
>
> Q. Now, when you see here on the 14th you have a history of acute headaches; is that not

correct?

A. By March 14.

Q. By March 14?

A. I have headache that is almost two weeks old by this time, correct.

Q. You know the onset was acute; is that not correct?

A. Well, it was present for five days. I assume that the day before it was not there, so that it was of rapid onset rather then gradual, yes.

25T75-19 to 77-2.

REASONS FOR GRANTING THE WRIT

I. New Jersey so Applied its Law to Petitioners' Case as to Virtually Ensure Jury Mistake and Misconduct, and Such Mistake and Misconduct Followed

The courts of New Jersey have recognized that the state constitution's civil jury guarantee[1] would be meaningless absent public confidence in that mode of trial. "In order that there may be confidence in trial by jury it is necessary that the parties are to feel sure that verdicts are based on an

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1. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of a jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

N.J. CONST. art. I, para. 9.

honest consideration of the evidence and not upon prejudice or sympathy." Panko v. Flintkote, 7 N.J. 55, 62, 80 A.2d 302, 306 (1951). The verdict must accord with the charge. Wright v. Bernstein, 23 N.J. 284, 294-95, 129 A.2d 19, 25 (1957). The charge must correctly reflect the law (Talmage v. Davenport, 31 N.J.L. 561 (E. & A. 1864)) on the questions fairly raised by the evidence. Ball v. Porter, 23 N.J. Super. 491, 494, 93 A.2d 223, 224 (App. Div. 1952) (citing Broadwell v. Nixon, 4 N.J.L. 362 (Sup. Ct. 1817)). The duty to charge correctly exists "whether such instructions are specifically requested or not." Grammas v. Colasurdo, 48 N.J. Super. 543, 552, 138 A.2d 553, 558 (App. Div. 1958).

Aspirations sometimes fail: In this matter New Jersey applied its law in two aspects so as to greatly increase the chances of jury mistake and in two others so as to produce jury misconduct.

A. The Charge Did Not Correctly Reflect the Law

In Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984), and Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985), New Jersey adopted the loss of chance doctrine, set forth in Gardner v. National Bulk Carriers, 310 F.2d 284, 287 (4th Cir. 1962), cert. denied, 372 U.S. 913 (1963).

That doctrine holds a defendant liable when his misconduct diminishes plaintiff's chances of escaping from a predicament, even one for which the

defendant is not responsible; in effect it amounts to a diminution in the causation showing demanded of plaintiff. See Hake v. Manchester Township, 98 N.J. 302, 311, 486 A.2d 836, 841 (1985).

Here, petitioners asserted that, had Dr. Oberhand taken proper history, or had Dr. DiLallo, upon reading Dr. Oberhand's letter, called Mrs. O'Grady and inquired about her symptoms, either physician should have recognized the classical sign of a leaking aneurysm and referred her to a neurologist who could have diagnosed her condition and arranged for surgical treatment. The claim was that the negligence of Dr. Oberhand and the misconduct of the servant for whose omission Dr. DiLallo is responsible deprived Mrs. O'Grady of

her chance to escape from intercranial emergency.

In petitioners' case the trial court submitted the case to the jury employing a standard form proximate cause charge that took no account of loss of chance doctrine.[2] The New

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2. Model civil jury charges in New Jersey are prepared by a committee whose members are appointed by, but whose work product is not endorsed by, the Supreme Court. The proximate cause charge used here consisted in its entirety of one sentence of such a model charge. The portion used is here underlined.

> 7.11 PROXIMATE CAUSE--GENERAL DEFINITION
>
> By proximate cause is meant that the negligence of the defendant was an efficient cause of the accident, that is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about. It is defined as a cause which naturally and probably led to and might have been expected to produce the accident complained of.

N.J. Sup. Ct. Comm. on Model Jury

Jersey Supreme Court has held that it is not error to submit a loss of chance case on such a charge, absent objection by trial counsel. Gaido v. Weiser, 115 N.J. 310, 311, 558 A.2d 845, 845 (1989). Nevertheless, use of this language to administer a diminished standard of causation increases the chance of jury mistake.

B. The Charge Did Not Accurately Address the Question Raised by the Evidence

The letter referring Rosella O'Grady to Dr. DiLallo was misfiled by his employee and not discovered until after she had suffered a subarachnoid hemorrhage which prompt referral and treatment might have prevented. 25T111-

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Charges (Civil), Model Jury Charges--Civil § 7.11, at 273 (1986).

24 to 112-13. Petitioners pleaded the negligence of the servant and Dr. DiLallo's responsibility therefor. Dr. DiLallo entered a general denial and pleaded specifically that his acts or omissions were not the proximate cause of the injury. Causation, not denial of negligence, was Dr. DiLallo's defense in the pretrial order.

> It is plaintiff's position that this alleged office mismanagement constituted a deviation from accepted standards and that based on Dr. Oberhand's letter, Dr. DiLallo should or could have provided follow-up medical attention to the plaintiff. It is Dr. DiLallo's position that even if he had seen the letter, he may not have been prompted to take follow-up measures at that point.

Excerpt (Rider 2) from Pretrial Order, Appendix p. 23a, infra.

At trial Dr. DiLallo contested neither employee negligence nor

vicarious responsibility; in effect, he conceded petitioners' contentions. See, e.g., 25T112-14 to 114-23 (DiLallo, direct). His expert's testimony on the standard of care was offered solely to the proposition that had he seen the letter, he would have had no duty to, and hence probably would not have, contacted, questioned and referred Mrs. O'Grady, 26T37-24 to 40-16 (Jacobsen, direct), despite the fact that he thought her headache "an alarming complaint," 25T123-22 to 124-6 (DiLallo, cross). The pretrial order supersedes the pleadings when inconsistent therewith. New Jersey Court Rule 4:25-1(b)(16). The pleadings may be treated as amended to conform to the proofs. New Jersey Court Rule 4:9-2. There was

no issue of negligence in the case between petitioners and Dr. DiLallo.

The trial court, without objection from Dr. DiLallo's counsel, 19T159-9 to 161-8, considered the possibility of directing a verdict on the issue of employee negligence and Dr. DiLallo's responsibility.

> Since I don't see how an office person, now that I've reviewed it, is malpractice. Now, whether or not their negligence is imputed, whether their negligence would be imputed to Dr. DiLallo, I may rule as a matter of law that they are, but it seems to me the filing of it may be a negligence count as well.

19T159-19 to -25. However, the court later chose to give a standard negligence charge, 26T191-8 to 198-9, and to propound a jury interrogatory as to Dr. DiLallo's negligence, 26T200-19 to -21. The jury returned a verdict of

no negligence in response to that interrogatory. 27T5-7 to -9.

C. A Substantial Portion of the Defense Evidence Was Irrelevant and Misleading

Respondent Dr. Oberhand had no obligation to prove anything; his was an element-attacking defense, not an affirmative one. He chose to devote most of his energy to the proposition that Mrs. O'Grady's headache was not caused by a sentinel bleed. His argument had two branches. The first was that an aneurysm located in the position of Mrs. O'Grady's would either hemorrhage massively or not bleed at all; it would not bleed prodromally. The second was to advance alternative hypothesis as to the cause of the headache. Dr. Oberhand did not attempt

to urge that the headache was intermittent rather than constant.

Dr. Howard Medinets, Dr. Oberhand's neurological expert, testified that any bleeding from Mrs. O'Grady's aneurysm would cause disastrous brain damage immediately: there is no such thing as a sentinel or warning bleed. Hence, he said, Mrs. O'Grady's headache could not have been the result of such a bleed. 25T150-1 to -21.[3]

Dr. Medinets and other defense

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3. Dr. Medinets testified that he recognized no general neurology text as definitive. 25T193-21 to 25T195-6. A diligent search of the medical literature has produced no authority supporting Dr. Medinets' view; to the contrary, the recognition of sentinel or warning bleeds from aneurysms like Mrs. O'Grady's is general. See, e.g., J. Pool & D. Potts, Aneurysms and Arteriovenous Anomalies of the Brain 47-48, 60, 64 (1965).

witnesses suggested seven alternative etiologies for Mrs. O'Grady's headache. Allergy is mentioned 13 times by defense witnesses or counsel, arthritis 23, deviated septum 27, migraine headache twice, neck sprain 12 times, sinusitis 19, and subluxation 3.

These other diseases fall into two groups: Those which might produce stiffness of the neck, or pain in the neck radiating upward to the back of the head (neck sprain, cervical arthritis, subluxation) and those which might give a frontal headache or sinus pain (allergic rhinitis or sinusitis, inadequate sinus drainage because of a deviated septum, sinusitis caused by bacterial infection). Dr. Oberhand made no attempt to offer proof as to

particulars about the characteristic onset or duration of severe headaches from the causes he propounded.[4] His

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4. Classic migraine headache is generally preceded by an aura that may include some vision loss in the visual field or visual prodromes, such as flashing lights or jagged lines. Hearing and motor impairment may also be involved. These headaches are primarily hemicranial (affecting half the head) and usually take the better part of an hour to reach the peak of their intensity. The pain involved is described as pulsing or throbbing; the headaches are recurring, not constant. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963); Graham, Seven Common Headache Profiles, 13 Neurology 16 (1963); S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache 11-26 (3d ed. 1982); A. Friedman, Recurring Headache, 1 Primary Care 275 (1974); M. Lee & J. Resch, Practical Clinical Neurology for the Otolaryngologist, in Otolaryngologist 866 (1980); Emergency Medicine, Concepts and Clinical Practice 178-81 (P. Rosen ed. 1983).

Cluster headaches are also generally hemicranial and involve a boring or throbbing pain that may be located behind one eye, causing weeping in that eye. These headaches are sudden, regularly recurring attacks that

theory seemed to be that a frontal headache caused by one of one group of diseases coincided with neck stiffness and pain caused by one of the other group of diseases, and the two symptoms together mimicked the headache of a leaking aneurysm: Mrs. O'Grady had the headache she described, he suggests; it just did not come from a sentinel bleed.

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may take place at hourly or daily intervals for a period of time and then disappear. The individual headaches themselves rarely last for more than two hours. Id.

Sinus headache usually begins gradually in the morning and decreases in severity during the day. S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache 11-26 (3d ed. 1982). Sinus headaches tend to have a characteristic temporal pattern: They begin sometime after the sufferer has arisen in the morning, rapidly reach a peak, and then diminish over the course of the day. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963).

In the Appellate Division, and again in proceedings in the New Jersey Supreme Court, Dr. Oberhand reiterated the contention that Mrs. O'Grady suffered no bleed.

> [T]he issue of a bleed, if and when it occurred and whether any bleed occurred at all prior to March 31, 1983, when Mrs. O'Grady suffered the ruptured aneurysm, was one of the many issues of fact resolved by the jury.

Brief and Appendix in Opposition to Plaintiffs' Petition for Certification on Behalf of Defendant Robert I. Oberhand, M.D., 6.

The difficulty with all this is that it is irrelevant. Dr. Oberhand's negligence did not turn on whether Mrs. O'Grady suffered a bleed. It turned on whether, had he taken proper history, he would have gained information from which

he should have suspected aneurysm and referred her to a neurologist for proper care.

D. The Questions from the Jury Evidence a Verdict Based on Extraneous Information

The jury made five inquiries, each in some way relating to whether Mrs. O'Grady's headache was constant or intermittent during the period March 4 to March 16, 1983. 26T231-2 to -6; 26T235-17; 26T237-21 to -24; 26T247-12, 13. Shortly after hearing an answer, the jury entered verdicts of no cause. It is fair to draw the inference from that sequence of events that the jury considered the question dispositive. See Kulbacki v. Sobschinsky, 38 N.J. 435, 452, 185 A.2d 835, 845 (1962); Pinter v. Parsekian, 92 N.J. Super. 392,

397, 223 A.2d 635, 638 (App. Div. 1966). But that question was never placed in issue by the parties. Witnesses and counsel for both sides spoke indifferently of "headache" and "headaches." Only two pieces of evidence were even tangentially relevant to the continuousness of the headache; neither was material in the sense of having been offered to that proposition.[5] The jury asked about both items. Those questions so confused trial counsel and the court that the wrong portion of the transcript

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5. These were Exhibit P-7, a graph prepared by petitioners' expert Dr. Bennett M. Derby, plotting Mrs. O'Grady's headache pain against time, and a passage in the cross-examination of Dr. Oberhand in which he first said that the headache was intermittent and then that he never asked Mrs. O'Grady whether it was intermittent or continuous. 25T76-2 to -21 (Oberhand, cross by O'Connor).

was read back.

It would have been possible to offer evidence that Mrs. O'Grady's headache was intermittent; respondents did not do so. It would have been possible to offer expert opinion that an intermittent headache might be less likely than a constant one to indicate prodromal bleeding;[6] respondents did not do that either. Instead, they satisfied themselves with the contention that there had been no bleed, and so left the jury to wonder what had happened to Mrs. O'Grady. Such an opportunity for specu-

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6. Intermittency is characteristic of cluster and migraine headaches which, like prodromal bleed headaches, can be of great intensity. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963); Graham, Seven Common Headache Profiles, 13 Neurology 16 (1963); S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache, 11-26 (3d ed. 1982).

lation is itself prejudicial. O'Connor v. Altus, 123 N.J. Super. 379, 386, 303 A.2d 329, 332 (App. Div. 1973), aff'd, 67 N.J. 106, 335 A.2d 545 (1975). In speculating, this jury consulted some private store of knowledge. It concluded (without evidence) that Mrs. O'Grady's headache was intermittent and then further concluded (without evidence) that intermittent headache and prodromal bleeding are mutually inconsistent.

II. Petitioners Were Denied Due Process in that Remedy for Jury Misconduct Depended on "Sheer Luck" and Remedy for Jury Mistake Took No Account of Judicial Confusion

There was judicial confusion and jury mistake at trial: Faced with a

pure causation defense, the judge first considered directed verdict on his own motion and then permitted the jury to dispose of that aspect of the case on a duty interrogatory and special verdict. There was clear and convincing circumstantial evidence of juror misconduct at trial: The jury, frustrated with an irrelevant defense, kept asking questions about facts not in evidence; when the uncomprehending court and counsel finally supplied it with an answer, it promptly returned a verdict.

What were petitioners' remedies? Review of the verdict was available under two standards; neither afforded due process.

A. Jury Misconduct and the "Sheer Luck" Rule

Like most jurisdictions, New Jersey

has rejected the doctrine of Vaise v. Delaval, 1 T.R. 11 (K.B. 1785); it permits post-trial examination of jurors, provided that examination is to extraneous influence, not mental process. See, e.g., State v. Kociolek, 20 N.J. 92, 100-05, 118 A.2d 812, 816-20 (1955) (Wm. J. Brennan, Jr., J.). New Jersey Court Rule 1:16-1[7] provides:

> Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to any matter relating to the case.

There is pertinent ethical provision:

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7. The rule is similar to equivalent provisions in other jurisdictions. See, e.g., U.S. Dist. Ct. for the Dist. of N.J., Local Rule 19B. The corresponding evidence law is conventional also. Compare N.J. Rule of Evid. 41 with Fed. R. Evid. 606(b).

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person except as permitted by law.

N.J. RPC 3.5.

Petitioners did not pursue this remedy; it was foreclosed. While New Jersey Court Rule 1:16-1 speaks the language of trial court discretion ("good cause shown"), the appellate cases informing that discretion make clear good cause is hard to find.

> Calling back jurors for interrogation after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct.

State v. Athorn, 46 N.J. 247, 250, 216 A.2d 369, 370 (1966).

Good cause is found when there is a volunteer informant. See, e.g., Scott v. Salem County Memorial Hosp., 116 N.J. Super. 29, 280 A.2d 843 (App. Div. 1971) (juror informed the court); State v. Onysko, 226 N.J. Super. 599, 545 A.2d 226 (App. Div. 1988) (juror contacted defense counsel); State v. Thompson, 142 N.J. Super. 274, 361 A.2d 104 (App. Div. 1976) (juror wrote letter to judge); State v. Weiler, 211 N.J. Super. 602, 512 A.2d 531 (App. Div.), certif. denied, 107 N.J. 37, 526 A.2d 130 (1986) (trial judge informed of jury misconduct); State v. Marchitto, 132 N.J. Super. 511, 334 A.2d 354 (App. Div. 1975) (juror informed defense counsel who contacted trial judge).

If no direct informant can be

found, no amount of circumstantial evidence, whatever its quality or quantity, will suffice. In State v. Koedatich, 112 N.J. 225, 548 A.2d 939 (1988), defendant, appealing conviction for the second of two murders, moved for questioning of jurors, offering a newspaper story quoting three jurors to the effect that they had known of defendant's connection with the first murder. 112 N.J. at 286-87, 548 A.2d at 971. The Supreme Court refused. "There is no juror affidavit in this case. Furthermore, we strongly believe that the contents of a single newspaper article, indisputably hearsay, cannot be the sole basis for the extraordinary procedure of post-trial jury interrogation." 112 N.J. at 289, 548 A.2d at 972.

The New Jersey Supreme Court has recognized the adventitiousness of this doctrine.

> It may appear odd to recognize a ground for the invalidation of a verdict while denying a litigant a chance to find out whether such an event perchance did occur. The fate of a defendant is thus made to depend upon sheer luck, that the wrongful event somehow comes to light. The weight of the criticism is appreciated, but when contending values clash in their demands, a balance must be struck, and the balance struck is not shown to be a poor one because in some unknowable cases there may be an injustice.

State v. LaFera, 42 N.J. 97, 107, 199 A.2d 630, 636 (1964).[8]

The rule is not a reasoned attempt to distinguish kinds of evidence on the basis of trustworthiness; once good

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8. Compare the efforts made to avoid prejudice from general press coverage in death cases. State v. Bey (I), 112 N.J. 45, 84, 548 A.2d 846, 886 (1988).

cause is shown, reversal of verdict may be had even if the evidence of misconduct developed is slight or circumstantial. Indeed, misconduct can be presumed from such conduct as consulting a dictionary.

> [T]he test whether a new trial will be granted is whether the extraneous matter could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the extraneous matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The stringency of the rule is not mere formalism; the rule is "imperatively required to secure verdicts based on proofs taken openly at the trial free from all danger of extraneous influences," Lamphear v. MacLean, 176 App. Div. 473, 162 N.Y.S. 432 (1916). On elementary principles the jury's verdict must be obedient to the court's charge and be based solely on legal evidence properly before the jury. McLeod v. Humeston & S. Ry. Co., 71 Iowa 138, 32 N.W. 246 (Sup. Ct.

Iowa 1887); Guntzer v. Healy, 176 App. Div. 543, 163 N.Y.S. 513 (1917).

Palestroni v. Jacobs, 10 N.J. Super. 266, 271, 77 A.2d 183, 185 (App. Div. 1950) (Wm. J. Brennan, Jr., J.A.D.).

Nor is the sheer luck rule supported by unequivocal policy considerations. Good cause has been found on the basis of evidence developed when an attorney "inadvertently" met a jury informant; it has been said that evidence obtained by conduct in violation of RPC 3.5 is admissible in a New Jersey Court Rule 1:16-1 proceeding. State v. Riley, 216 N.J. Super. 383, 390, 392, 523 A.2d 1089, 1092 (App. Div. 1987); see also Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 44, 366 A.2d 1006, 1008 (App. Div. 1976) (Forelady

gave evidence to attorney not connected with case).

B. Jury Mistake Caused by Judicial Confusion and the "Miscarriage of Justice" Rule

1. Background

Under New Jersey Court Rule 4:49-1(a), a trial court judge may grant a motion whenever "having given due regard to the opportunity of the jury to pass on the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." Similar language describes the scope of review. New Jersey Court Rule 2:10-1.

The search for mistake, unlike that for misconduct, is not limited by reluctance to inquire into the condition of a juror's mind.

> The "mistake, passion, partiality or prejudice" standard has so often been used as a term of art that it is sometimes difficult to realize that it has always had literal significance; the verdict of a jury should be set aside as against the weight of the evidence when, upon consideration of all the evidence, it is manifest that the conclusion reached by the jury was a product of some form of irrationality rather than of a reasoned judgment.

M. Brochin & R. Sandler, Appellate Review of Facts in New Jersey, Jury and Non-Jury Cases, 12 Rutgers L. Rev. 482, 493 (1958).

Nor is there any requirement of a live informant. In particular, mistaken disposition of a case on a improper interrogatory has been found sufficient evidence of jury mistake. A jury interrogatory on an issue not in the case may be answered routinely rather than with deliberation, and that answer

should not be credited. Acken v. Campbell, 67 N.J. 585, 589, 342 A.2d 172, 174-75 (1975). An improper interrogatory compounds the misleading effect on the jury of an erroneous charge. Gautam v. DeLuca, 215 N.J. Super. 388, 396, 521 A.2d 1343, 1347 (App. Div. 1987). A verdict entered in answer to such an irrelevant interrogatory bespeaks "confusion or mistake on the part of the jury." Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 45, 366 A.2d 1006, 1008 (App. Div. 1976). A jury finding unsupported by evidence is based "on impermissible factors, extraneous to the proofs in the record or reasonable inferences therefrom." Williams v. Page, 160 N.J. Super. 354, 366, 389 A.2d 1012, 1018 (App. Div.

1978).

2. Trial Court Confusion and and the Standard of Review

The standard by which a trial court judge evaluates a motion for a new trial under New Jersey Court Rule 4:49-1(a) and that by which his decision is reviewed on appeal under New Jersey Court Rule 2:10-1 are, save for deference to credibility, the same. S. Pressler, Rules Governing the Courts of New Jersey R. 2:10-1 comment 2, at 406 (1990); Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708-09 (1969). The "miscarriage of justice" language, and a briefly-used predecessor phrase ("manifest denial of justice under the law"[9]), were adopted to replace the

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9. This wording was promulgated as part of the general revision of 1969. It was amended in 1971 to reflect Dolson. S. Pressler, Rules Governing

former "mistake, passion, partiality or prejudice" test because that language had become entangled in the question (disposed of by Dolson) of whether appellate court consideration of new trial motions should be narrower than that of the trial courts. Compare Hager v. Weber, 7 N.J. 201, 210, 81 A.2d 155, 160 (1951) with Hartpence v. Grouleff, 15 N.J. 545, 548, 105 A.2d 514, 517 (1954). It was only the scope of review problem that produced the difficulty, not the underlying new trial test itself. The older standard informs the new; a trial court in New Jersey may set aside a verdict under R. 2:10-1 for mistake, just as its predecessors have

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the Courts of New Jersey R. 2:10-1 comment 2, at 406 (1990).

done since Vunck v. Hull, 3 N.J.L. *578, *581 (Sup. Ct. 1809). By reason of Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708 (1969), appellate courts use the same rubric to perform the same task.

The difficulty is that where jury mistake is the fruit of confusion on the part of the trial judge, the unitary "miscarriage of justice" language, by encouraging appellate judges to place themselves in the shoes of trial judges, shields them from the trial courts' errors in analysis.

The appellate courts have recognized some difference in decisional process flowing from their different standpoint.

> An appellate court is unable to get the "feel of the case" and lacks

> the opportunity to observe and hear the witnesses who appear before the trial judge and jury. Therefore, since its scope of review has these inherent limitations, an appellate court must make allowance for factors which were evident to the trial court and jury but which cannot be gleaned from the written record.

Fritsche v. Westinghouse Electric Corp., 55 N.J. 322, 330, 261 A.2d 657, 661 (1970).

By the same analysis, an appellate court has advantages it cannot abandon without committing grave injustice. Here, only close analysis of the transcript can show the degree to which the trial judge and counsel misconceived the relevance of Dr. Oberhand's evidence, the nature of Dr. DiLallo's defense and the danger hinted at in the jury's five questions. The unitary standard of review fails in that it does

not command the Appellate Division to look beyond the opinion below and analyze the transcript for evidence that not only the jury, but the trial court, was confused by the proceedings. Trial judges are human and occasionally blunder; the policy of deference to trial court judgments as to credibility does not extend to ignoring those blunders.

C. Petitioners Were Denied Due Process of Law

Petitioners here were put to a beggars' choice. They could have attempted to offer their clear and convincing circumstantial proof of jury misconduct as good cause for a New Jersey Court Rule 1:16-1 motion, knowing that such a motion was bound to lose.

In the alternative, they could have pursued an appeal under the "miscarriage of justice" standard of New Jersey Court Rule 2:10-1, knowing that the New Jersey courts are loath to inquire into jury mistake produced by trial court confusion. They chose this option and lost.

New Jersey has no federal constitutional obligation to give petitioners a jury trial. Walker v. Sauvinet, 92 U.S. 90, 92-93 (1876) (Seventh Amendment not incorporated by Fourteenth Amendment privileges and immunities clause). But if it does give such a trial, the verdict should be free of extraneous influence. Fxclusion of evidence of such misconduct violates "the plainest principles of justice."

Mattox v. United States, 146 U.S. 140, 147 (1892) (criminal).

New Jersey has no constitutional obligation to grant petitioners any appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). If it does so, that appeal must consider the trial judge's misunderstanding of the fundamental issues of the case.

The jury in the present matter was misled by the court as to the nature of petitioners' case against respondent Dr. DiLallo and was unassisted by the rule of relevance in hearing their case against respondent Dr. Oberhand. The jury cannot be blamed for seeking to do justice in the best way it could. But justice done dehors the evidence denies due process of law. Without punctilious

judicial supervision, the jury could not perform its task.

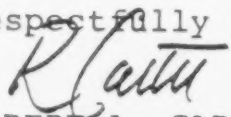
> A jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court . . . a presiding law tribunal is implied, and . . . the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference . . . a mere commission though composed of twelve men, can never properly be regarded as a jury.

Capital Traction Co. v. Hof, 174 U.S. 1, 15 (1898).

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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February 5, 1990

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* Counsel's application for admission to the Bar of this Court is pending; he signs these papers by courtesy of the Clerk of this Court, who has granted permission therefor.

APPENDIX

SUPREME COURT OF NEW JERSEY
C-26 September Term 1989

30,495

ROSELLA & FRANK O'GRADY,
Plaintiffs-Petitioners,

vs.

ON PETITION
FOR
CERTIFICATION

ROBERT I. OBERHAND, M.D.,
Defendant-Respondent,

and

JOSEPH DILALLO, M.D., et al.,
Defendants.

To the Appellate Division,
Superior Court,

A petition for certification of the judgment in A-4478-86T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 6th day of September, 1989.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that
the foregoing is a
true copy of the
original on file in
my office.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4478-86T1

ROSELLA and FRANK O'GRADY,

Plaintiffs-Appellants,
Cross-Respondents,

v.

ROBERT I. OBERHAND, M.D.

Defendant-Respondent,
Cross-Appellant,

and

JOSEPH DiLALLO, M.D.,

Defendant-Respondent,

and

PAUL R. FRANZ, D.C.;
PHYLLIS LaFLAMME, R.N.;
MARY C. MAJOR; and
MARY ANN HAMBURGER,

Defendants.

ORIGINAL FILED
Apr. 20 1989

Emille R. Cox,
Esq.
Acting Clerk

Argued April 5, 1989 --
Decided Apr. 20, 1989

Before Judges Gaulkin, Bilder and
R.S. Cohen.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

Robert A. Carter argued the cause for appellants, cross-respondents (Mr. Carter, attorney; Judith E. Stein, of counsel and on the brief).

John P. McGee argued the cause for respondent, cross-appellant Robert I. Oberhand, M.D. (McDermott, McGee & Ruprecht, attorneys; Mr. McGee, on the brief).

Neil Reiseman argued the cause for respondent Joseph DiLallo, M.D. (Reiseman, Mattia & Sharp, attorneys; Mr. Reiseman, of counsel; Jane S. Kelsey and Kenneth P. Westreich, on the brief).

PER CURIAM

A careful review of the record and a consideration of the contentions urged by the plaintiff, in light of the applicable law, satisfies us that all of said contentions and issues raised are clearly without merit. R. 2:11-3(e)(1)(A) and (E). See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). We add only that we will not consider

grounds based purely on speculation. See State v. Wilkerson, 38 N.J. Super. 166, 168 (App. Div. 1955). The cross appeal is moot.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emille Cox
Acting Clerk

The following is a reprint of the oral opinion of the Honorable Lawrence Weiss of the Superior Court of New Jersey, Law Division, denying plaintiffs' motion for a new trial, taken from the stenographic transcript of motion proceedings, April 24, 1987, page 10 line 4 to page 20 line 1:

> Well, this is a motion for a new trial in regard to this matter where the jury rendered a verdict of was Dr. Oberhand professionally negligent. They voted that he was not professionally negligent. And then when I said was Dr. DiLallo professionally negligent, they voted that he was not professionally negligent. The case was tried over a period of days.
>
> There was produced expert testimony. There was factual testimony and the records were placed or gone over during examination and cross-examination of all the witnesses.
>
> The rule that the court must determine is, the trial judge shall grant the motion if, after having given due regard of the jury to pass upon the credibility of the witnesses, it clearly appears that

there was a miscarriage of justice.

Under the facts of this case, this is a case in which the plaintiff has had a severe disabling condition as a result of an intercerebral hemorrhage. The question -- there was a serious question concerning what caused that hemorrhage and when it first appeared. The plaintiff's testimony through her husband, that is Mr. O'Grady, testified that sometime on Friday afternoon she said she had "the worst headache I ever had in my life," if I recollect the testimony, and that she was disabled to the point where she had to lay down for a period of time, Friday night, Saturday, Sunday. By Sunday afternoon the headache was diminishing to the point where she was able to come downstairs and she had some meal and watched television with her family and Monday morning she called Dr. Oberhand and then made an appointment and because Dr. Oberhand had been treating her since nineteen hundred seventy-six for various conditions that all had to do with the resulting headaches. In fact, she was being treated for, there was evidence of migraine headaches, evidence of headaches as a result of sinusitis in which they were considering an SMR or submucosa resection. Thereafter when she came to the doctor's office, she was capable of driving herself; she was capable of and appeared at the office not to be in extreme diffi-

culty; she was able to converse with the doctor, be examined by the doctor, and the doctor had his records of her previous conditions and, in fact, had an opportunity to observe the patient and the doctor's testimony was that the patient said to him those headaches are back again.

Now, whether or not the headache was of such intensity as it was the worst headache I ever had in my life, or whether or not those headaches were back again, is a credibility issue. I recognize that during the course of the examination of one of the defendant's experts a learned treatise was used only for credibility, not for substantive evidence, in which the issue was, the quote out of that textbook was, doctor, isn't it a fact that one of the signs of this type of condition, that is a leaking aneurism, would have been -- the patient might, the patient would say or refer to this was one of the worst headaches I ever had or this was the worst headache I ever had in my life, and the expert agreed that would have been.

But the jury is the trier of the fact. They become the judges of the facts, and I explained to them at the commencement of the trial, and I re-explained to them at the end of the trial, it is the function of the trier, the judges of the facts, to resolve issues of

credibility. To make that evaluation based upon many factors: The appearance and demeanor of the witness on the stand; do they have an interest in the outcome of the case; do they have a possible bias in favor of the side for whom they testified; are they supported or contradicted by other evidence; is their testimony reasonable or unreasonable in light of all the other evidence?

That credibility function even applies in terms of expert witnesses. The jury was told in the charge that I gave to them at the end of the case that it is one the functions of the jury to accept or not accept the testimony of an expert witness; that it's peculiarly within the function of the jury in evaluating the testimony of witnesses and expert witnesses who are allowed to give opinions because of their training, education and experience that bring to the jury something that most lay people are incapable of understanding, and in this case there cannot -- the jury cannot understand or draw their own standard, but must listen -- and the standard that applies must be that which is given to them by expert testimony. But that does not mean that they have to accept the expert testimony. The charge is clear. You are not bound by such expert's opinion, but you should consider each opinion and give it the weight to which you deem it entitled,

whether it be great or slight, or you may reject it.

In examining each opinion, you may consider the reasons given for it, if any. You may also consider the qualifications and credibility of the expert. It is always within the special function of the jury to decide whether the facts on which the answer of an expert is based actually exists. The value of the weight -- or weight of the opinion of the expert is dependent upon and no stronger than the facts on which it is predicated.

In examining an expert witness, counsel may propound to him the type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts to be given an opinion based upon that assumption.

And then, of course, I told them if there is conflicting expert testimony, they have to evaluate that and resolve that.

The jury listened to and had an opportunity to hear all the testimony and the experts. The jury was told that merely because there is a bad result, that does not mean that a physician has committed professional negligence. The jury is told that you can't hide behind that, but that does not mean that he's professionally

negligent if a bad result occurs if he is treating a patient.

The jury is also told that if there is a judgment, the physician makes a judgment of two or more different decisions. If it's a wrong judgment, it's still proper as long as the judgment is not a deviation from accepted medical practice.

Dr. Oberhand testified concerning how long he treated the patient. There was evidence clearly that the -- that a few days before the plaintiff had hurt her neck during a aerobic-type of exercise and there was evidence that came out that, although Dr. Oberhand didn't know it, she was also seeing a chiropractor to alleviate it.

I bring that out because although counsel agrees that to some degree -- well, I think counsel does agree Dr. DiLallo, there was no evidence, and doesn't raise an issue of Dr. DiLallo because Dr. DiLallo received a letter and even though the case was tried and Dr. DiLallo's attorney clearly agrees that the issue was he should have read it and if he didn't read it, if he didn't read it, you assume he should have read it and, therefore, what would he have done.

And the evidence was clear, by the time he got the letter, if he

had called Mrs. O'Grady she would have said because the chiropracter, she had been treated by a chiropractor, the headaches were gone, and that his testimony, the expert, is clear, the doctor wouldn't call her in because she was having headaches that were gone. They were treated. The symptomatology based upon appears to be, at least to some degree, caused by an arthritic condition that was aggravated. A pre-existing arthritic condition was aggravated by doing, to some degree, I'm saying it because we are not dealing with whether or not an aneurism, an intercranial hemorrhage, a leaking hemorrhage, but that there was this arthritic, latent arthritic condition, aggravated by doing the type of aerobic exercises that also produces headaches, cervical headaches, and running up to the head. So that there's no question Dr. DiLallo, from the jury, had every right, and the evidence was clear, but I think the evidence was clear on both sides, as to both doctors.

Dr. Oberhand saw the patient twice. The first time he had his records. She was not a new patient. Not only that, but the testimony was, which supports, more than supports, but had the defend-ant Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think

he would have met that burden, had the burden been on the other side. He saw her on the 7th, had a history and treated her for over -- since 1976 and, in fact, they had discussed prior to having the submucosa resection and subsequent thereto contacted and told her maybe that's what we should be doing because those headaches are back again and that's the step to take and, in fact, Mr. O'Grady, the testimony was, asked Dr. Oberhand to write a letter, since he wanted to present it to his medical insurance company to make -- to get a determination of what was going to be paid in terms of the submucosa resection because as -- it was clear that they wanted to know, the reasons of which were not brought before the jury, but in order to get the cost valued because most insurance medical pays 80 percent of the cost of that and that, therefore, everyone understood and the doctor -- and that he thereafter saw her again telling her to come back on the 14th and then he was then feeling, well, maybe it wasn't this type of headache, which was as a result of sinusitis or the deviated septum, which she had, and then wrote a letter and said, look, maybe it's arthritic in your neck, your neck condition. But at all times examined her to some degree, had the previous history and what we fail sometimes to realize is no profession, whether it be an engineer, a lawyer or a doctor, is infallible.

The question is: Did he deviate from accepted standards of that profession? I find that the jury, had I been sitting on the jury, having listened to all the evidence, I would have voted the same way that the jury voted. I believe that the jury had all the evidence.

I don't say this as an offhanded remark because I said it at the end of the case after I charged the jury and the jury commenced their deliberations. Before the verdict came out, I said to all counsel on the record then that I felt that that was the best tried case that has ever been tried before me by three of the most competent lawyers that I have ever had before me that was able to give the jury all the evidence they were supposed to hear and that the jury had an opportunity to hear and focus and make their decision. I said it before the case was -- before they deliberated, I had no idea what the jury -- and the jury had an opportunity to render that.

I believe that the verdict is not against the weight the of the evidence. I believe there is not a miscarriage of justice. I believe that this is an unfortunate situation where people -- that the human body is a delicate mechanism that none of us truly understand, even doctors. Therefore the jury had a right under these terms to evaluate

whether or not Dr. Oberhand deviated. I find that the evidence was clearly sufficient to the jury to bring in the verdict they did. Therefore your motion for new trial is denied.

SUPREME COURT OF THE UNITED STATES

No. A-403

Rosella O'Grady, et al.,

Petitioners

v.

Robert I. Oberhand, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 5, 1990.

/s/William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 27
day of November, 1989.

ROBERT I. OBERHAND, F.A.C.B., P.A.
320 Lenox Avenue
Westfield, New Jersey 07090
(201) 233-5500

March 14, 1983
Re: Rosella O'Grady

Joseph A. DiLallo, M.D.
Summit Family Medical Center
396 Morris Avenue
Summit, NJ 07901

Dear Dr. DiLallo:

I examined Mrs. O'Grady on March 14, 1983. You are aware of her long history of allergic rhinitis, aggravated by significant deviations of her nasal septum.

Mrs. O'Grady is presently complaining of severe, disabling headaches. Pain begins at the base of the skull, and radiates over the top of her head to her forehead. She also has some pain in her cheeks. She has pain radiating down the cervical spinal area posteriorly. She is under treatment by a chiropractor for diffuse spinal problems.

Otolaryngologic examination on March 14, demonstrates a blood pressure in her right arm in the sitting position of 134/94. The ear canals and drums are clear. Although her septum is severely deviated, there is no nasal discharge, allergic mucosal edema, or complaints of nasal blockage. Examination of the nasopharynx, throat, larynx and neck

reveals no abnormalities. There is no tenderness over the temporomandibular joint areas. Because Mrs. O'Grady was complaining of recent left ear blockage with hearing loss, audiometry was performed. A moderate right sensorinueral hearing loss with a precipitous high tone dropoff is noted, which Mrs. O'Grady has been aware of for several years. In addition, there is a mild low tone left conductive hearing loss. There is early high tone sensorineural hearing loss in the left ear as well. Tympanometry reveals normal middle ear pressures bilaterally.

Sinus x-rays have been ordered, and the results are pending. I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal, I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will recheck her hearing in two months.

If you have any questions, please do not hesitate to call me.

Respectfully,

/s/Robert I.Oberhand, M.D.
Robert I. Oberhand, M.D.

RIO: vl
cc: Rosella O'Grady

Affidavit of Frank O'Grady

Robert A. Carter, Esq.
15 Washington Street
Newark, N.J. 07102
(201) 648-5216
Attorney for Plaintiff-Appellants

ROSELLA & FRANK O'GRADY, Plaintiff-Appellants, v. ROBERT I. OBERHAND, M.D., et al., Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate # A-4478-86-T1 Civil Action AFFIDAVIT

State of New Jersey)
) ss:
County of Essex)

Frank O'Grady, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a plaintiff in the above matter.

2. Referring to the afternoon of Thursday, March 26, I remember clearly that shortly after the jury retired for deliberation, and this was approximately 3:05 p.m., shortly after that I heard loud voices coming from the jury room. Then around 3:35 p.m., the jury sent out the note asking about the headache. A

little while later, the jury sent out another question.

3. I also recall that on March 27 things started with the judge reading some of Dr. Oberhand's deposition. He was answering the jury's questions from the previous day. Then they went back in, and in a little more than an hour, they came back with the verdict.

4. In reference to the jury asking for my deposition -- on Thursday, March 26, sometime after they sent out the note asking, "if P-7 referred to Rosie's headache," and "in Oberhand's deposition does he say continuous headache for 12 days or does he say a series of disabling headaches," the jury sent out a note asking to see my deposition. The judge's comment was, "I can't give them that," and he also said to his clerk, "Tell them I can't give them that." I called O'Connor that night and told him I thought the reason the jury wanted it was to refer to the one area where McGee challenged me on the question in my deposition, "did the headache continue in the period from March 14th to March 31st?" to which my answer was "yes."

5. Referring to the transcript -- March 23, page 44, starting on line 22 -- my answer is not stated correctly. I remember quite clearly that what I said was, "yes, it did 'cause [because] as I told you, it ended on the 16th, which is between the 14th and the 31st." Then, McGee's question, starting on line 24, is mis-typed. His question was, "it didn't persist until the 31st, is that what you are saying, is that so?" And

my answer on page 45, line 1 is appropriately, "yes."

BY:/s/Frank O'Grady
FRANK O'GRADY

Sworn and subscribed before
me on July 4th, 1988

/s/ Robert A. Carter
AN ATTORNEY AT LAW OF
THE STATE OF NEW JERSEY

The following is a reprint of an excerpt from Judge Weiss' charge to the jury, concerning proximate cause, taken from the stenographic transcript of the trial proceedings, March 26, 1987, page 198 line 10 to page 199 line 5:

> Now, you have just heard me use the term proximate cause. By proximate cause it means that the negligence of the defendant in this case, either or both doctors, was an efficient cause of the condition. That is a cause which necessarily set the other causes in motion, and was a substantial factor in bringing the condition about. And you have to make that finding as to whether or not this condition, what happened on March 31st, is a failure of the doctors.
>
> If you find there is a deviation whether or not that brought about the condition, it could have been prevented, is one of the facts. Again, I am trying to put it in simple terms. I am not telling you how you should decide this. You heard the physicians. You heard their opinions, and their testimony. And I am not going to recapitulate that.

Rider 2 from Pretrial Order

FACTUAL AND LEGAL CONTENTIONS OF DEFENDANTS JOSEPH DiLALLO, M.D., PHYLLIS LaFLAMME, RN, MARY C. MAJOR, MARYANN HAMBURGER

At the times referred to in the complaint, Dr. DiLallo was a duly licensed physician of the State of New Jersey, specializing in internal medicine. The plaintiff began treatment with Dr. DiLallo in or about 1972. Over the course of the next ten years, Dr. DiLallo or his associates saw the plaintiff on several occasions for treatment of various medical problems, including chest pain, bursitis, upper respiratory tract infections, elbow pain, etc. The only time Mrs. O'Grady complained of a headache was during a telephone conversation on January 9, 1981. She reported to Dr. DiLallo that she had been taking indocin which had been prescribed by her orthopedist Dr. Morrison. Dr. DiLallo also prescribed fiorinal, and this rectified the situation.

Dr. DiLallo last saw the plaintiff on August 24, 1982. At that time, the plaintiff's tamperature and blood pressure were recorded. Dr. DiLallo was not aware of the plaintiff's severe headaches, except by a letter by Dr. Oberhand dated March 14, 1983,

inadvertently filed prior to Dr. DiLallo's review. This letter concludes " I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will re-check her hearing in two months."

It is plaintiff's position that this alleged office mismanagement constituted a deviation from accepted standards and that based on Dr. Oberhand's letter, Dr. DiLallo should or could have provided follow-up medical attention to the plaintiff. It is Dr. DiLallo's position that even if he had seen the letter, he may not have been prompted to take follow-up measures at that point. In addition, no call was ever received from Dr. Oberhand concerning his examination of Mrs. O'Grady or the fact that he was referring the plaintiff back to Dr. DiLallo for further evaluation. Further, the plaintiff had not been seeing Dr. DiLallo at all in early 1983, and she never contacted him at all concerning the nature and severity of her headaches.

The defendant, Joseph DiLallo, M.D., denies any negligence or malpractice with respect to the

care and treatment which he afforded to the plaintiff at any time and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.

It is admitted that at the times referred to in the complaint, defendant Phyllis LaFlamme, RN, was a duly licensed registered nurse of the State of New Jersey who was employed as a " back office " nurse in Dr. DiLallo's office in or about March of 1983. At that time, Nurse LaFlamme was primarily responsible for direct patient care. She had no responsiblity for opening the mail and she does not recall seeing the letter which was received from Dr. Oberhand. She was also not responsible for filing the letter in the patient's file. Nurse LaFlamme denies any negligence or malpractice with respect to the caring and treatment which was afforded to the plaintiff at any time and specifically alleges that the plaintiff was cared for totally in acccordance with accepted medical standards.

At the times referred to in the complaint, defendant Mary C. Major was a medical assistant and was employed by defendant Joseph DiLallo, M.D., in or about March of 1983. At that time, she was charged with escorting the patients from the outer office into the examining rooms. It was not her duty to open the mail. She has no

recollection of the Oberhand letter and she was not the individual who filed the letter in the plaintif's chart.

This defendant, Mary C. Major, denies any negligence or malpractice with respect to the care and treatment which was afforded to the plaintiff, at any time, and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.

At the times referred to in the complaint, defendant Maryann Hamburger was the office manager for Dr. DiLallo. At that time, her duties were to schedule patients, acknowledge when patients came into the office, bill patients, deposit checks and open the mail. If there was a letter or report from a doctor, she would place the letter on the counter where it would be clipped to the patient chart and left on the doctor's desk. She does not recall ever seeing the letter from Dr. Oberhand nor does she recall filing the letter in the plaintiff's file. The defendant, Maryann Hamburger, denies any negligence or malpractice with respect to the care and treatment which was afforded to the plaintiff, at any time, and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.

No. 89-1275 (2)

In The

Supreme Court of the United States

October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D., JOSEPH DiLALLO, M.D., PAUL R. FRANZ, D.C., PHYLLIS LaFLAMME, R.N., MARY C. MAJOR and MARY ANN HAMBURGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT JOSEPH DiLALLO, M.D.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT JOSEPH DiLALLO, M.D.

COUNTER-STATEMENT OF THE CASE

The first time that respondent Joseph DiLallo, M.D. saw petitioner Rosella O'Grady as a patient was August 24, 1982

(25T106: 21-23). Previously, she had been seen by his office associate, Dr. Mary Herald on November 20, 1975. Mrs. O'Grady presented on several occasions with sinus-type headaches running over the front of her head (25T107: 11-17). Dr. Herald's impression was sinusitis (25T109: 35).

On August 20, 1977 Mrs. O'Grady again appeared at Dr. DiLallo's office complaining of headaches and head congestion (25T110: 1-2). On January 9, 1981 Mrs. O'Grady called Dr. DiLallo's office once again indicating that she was suffering from headaches. On this occasion she indicated that she had headaches for three days with eye pain (25T111: 1-2). Therefore, between 1975 and 1982, Dr. DiLallo was aware from Mrs. O'Grady's history that this was a woman plagued with periodic sinus-type headaches. This history necessarily plays an important part in assessing the overall condition in March of 1983.

Dr. Paul Franz, the petitioner's chiropractor, also substantiated the petitioner's headache history. On October 22, 1982, Mrs. O'Grady filled out a confidential medical history at which time she checked Dr. Franz' form indicating that she suffered from headaches frequently. Furthermore, she advised him that she had them for twenty years, experiencing them two to three times a week and lasting two to three hours. She experienced them ". . .behind the eyeballs, radiating to the back of her head." They were sometimes associated with nausea (24T57: 25; 24T58: 10).

When Dr. Oberhand saw Mrs. O'Grady on March 7, 1983 her complaints were as follows: severe cervical sprain, pain in the forehead, pains in the back of the neck and over the top of the head, pain behind the eyes, pressure in the face, congestion, post-nasal discharge, ear blockage and hearing loss, all present for five days (25T37: 15-21). Counting back five days, the onset of the complaint coincided with a neck injury which petitioner

sustained while exercising on March 2, 1983.

Mrs. O'Grady testified that as a result of this neck injury she went to see a chiropractor, Dr. Franz, on March 2 (23T30: 11-15). Dr. Franz examined Mrs. O'Grady on March 2, and found that there were subluxation compressions present from the cervical spine which would account for her neck pain (24T74: 10-22). Furthermore, x-rays revealed a degenerative joint disease of her cervical spine (24T76: 15-25; 24T77: 1).

In his evaluation of Mrs. O'Grady's headache, Dr. Oberhand explained that he evaluates how comfortable or in obvious distress the patient is, whether the patient is distracted in any way, and he evaluates the patient's posture and demeanor, for abnormalities (25T39: 1-7). On this particular day Mrs. O'Grady had driven herself to the office, she was unattended, comfortable, and not in any abnormal distress. It was Dr. Oberhand's conclusions following his physical examination that she was suffering from another sinus infection (25T40: 6-7). His course of treatment at that time was to prescribe an antibiotic (25T40: 15-16); to inject cortisone into the nose (25T40: 20-21), and to advise her to return in one week.

Additionally, he discussed the possibility of a sub-mucous resection (25T41: 1-7). Mrs. O'Grady did not ask for any medication for pain at that time (25T41: 20-23).

Following the office visit of March 7, 1983, Mrs. O'Grady called Dr. Oberhand's office on two occasions between March 7 and March 14, regarding insurance information. There were no complaints with respect to headaches during either of the two telephone conversations with Dr. Oberhand's office (25T45: 16-18; 25T46: 18-21).

Her next visit with Dr. Oberhand was March 14, 1983. Her

complaints at that time were cervical spinal pain radiating to the forehead, chronic eye pain and ear aches. She also reported for the first time that she was seeing a chiropractor for her pain (25T47: 8-11).

In addition to her complaints of headaches, she also had nasal complaints and neck complaints, but at that time, the neck pains were more severe than the sinus pains (25T51:10-13).

Dr. Oberhand again evaluated Mrs. O'Grady's complaints of headaches by evaluating her appearance and by performing a physical examination during the office visit.

Mrs. O'Grady appeared comfortable. She had driven herself to the office, and showed no distress or discomfort throughout the examination (25T48: 11-25). Dr. Oberhand properly advised Mrs. O'Grady that the neck complaints were probably not related to his specialty, but it was his feeling that it was related to the muscles of the neck and could be an arthritic problem (25T51: 8-22). Accordingly, he advised her to consult her family physician, Dr. DiLallo, for evaluation of the neck pain, he ordered sinus x-rays and advised her to return in two months to have her hearing rechecked (25T52: 15-25; 25T53: 1).

At that time, Dr. Oberhand also sent a letter to Dr. DiLallo with a copy to the petitioner dated March 14, 1983. *See* DOa 113-114. In that letter Dr. Oberhand advised Dr. DiLallo that Mrs. O'Grady was complaining of severe, disabling headaches. He indicated that he was referring Mrs. O'Grady back to Dr. DiLallo, "for treatment of cervical arthritis and medication or possibly with orthopaedic consult for further evaluation." He further stated that her pain was related to an otolaryngologic problem. Mrs. O'Grady acknowledged receiving a copy of Dr. Oberhand's letter, but did not follow up with Dr. DiLallo because at that time the headaches had gone away (23T41: 13; 23T42: 5).

Dr. Oberhand explained that he did not call Dr. DiLallo on the telephone because there was absolutely nothing urgent or emergent in the appearance of Mrs. O'Grady in his examination. She appeared to be perfectly comfortable (25T57: 17-20). He further explained that if the situation was in any way urgent, he would have sent her to the emergency room after calling her family physician (25T58: 3-10).

With respect to the letter of March 14, 1983 written by Dr. Oberhand, Dr. DiLallo did not see that letter until after Mrs. O'Grady had her hemorrhage on March 31, 1983 (25T112: 5-9). The letter was apparently filed by an office employee before Dr. DiLallo had an opportunity to review it. Assuming that he had seen the letter, Dr. DiLallo testified that he did not see any urgency in the letter which would have caused him to call Mrs. O'Grady upon receiving it (25T113: 3-12). Despite the fact that there was nothing urgent contained within the letter, he might possibly have called her anyway because he would have been interested in knowing what was happening with her (25T113: 13-19).

Following Mrs. O'Grady's second visit with Dr. Oberhand on March 14, 1983, she again saw her chiropractor, Dr. Franz on March 16, 1983. At that time he found a subluxation of the cervical spine and treated her with chiropractic manipulations (24T81: 13-16). During her next visit to Dr. Franz on March 21, 1983, Mrs. O'Grady told him that her headaches were gone. (24T81: 22-25). Therefore, assuming further that Dr. DiLallo had called Mrs. O'Grady on either March 17 or March 18 following his receipt of Dr. Oberhand's letter, the patient would have advised him that she had no complaints of headache at that time. Dr. DiLallo testified that under the circumstances that he would have indicated to her that if she has any further problems, that she should let him know (25T114: 13-23).

At trial each defense expert testified with literally no

contradiction that there was nothing urgent or emergent in the substance of the letter of March 14, 1983, and that had a call been made to the patient, there was no requirement under the circumstances to follow up with that patient if she no longer complained of headaches (25T186: 7-20; 26T40: 1-10). In fact, petitioner's own expert, Dr. Roger Rose, an otolaryngologist, agreed that the letter which was sent to Dr. DiLallo "does not convey any sense of urgency." (20T169: 13-16). He also agreed that the letter indicates that the patient is being referred specifically for cervical arthritis, or perhaps an orthopaedic problem and there is no sense of urgency or emergency in these conditions (20T170: 6-12). Ultimately, it was his opinion that urgent problems are not handled by the mail (20T176: 1-4). He furthermore conceded that people who complain of pain radiating from the back to the front of the neck and from the front to the back, are in the overwhelming number of cases *not* connected with subarachnoid hemorrhage (20T178: 5-12).

The expert testimony offered at trial established on March 31, 1983 that Rosella O'Grady suffered a spontaneous subarachnoid and intracerebral hemorrhage from a congenital aneurysm of the middle cerebral artery. This was the opinion of Dr. Howard Medinets, a neurosurgeon who was called as an expert witness on behalf of Dr. Oberhand and Dr. DiLallo (25T152: 23; 25T153: 1). Additionally, it was his opinion that even if a CAT scan had been taken between March 7, 1983 and March 14, 1983, it would have been perfectly normal (25T158: 23-25; 25T159: 1). He based the fact that the subarachnoid hemorrhage occurred spontaneously on March 31, 1983, based on the *location* of the aneurysm. Specifically, he testified that a rupture from the middle cerebral artery is a catastrophe, like an explosion inside the head (25T167: 11-12). Damage also occurs because the blood vessels in the brain go into a spasm in an attempt to control the bleeding and decrease the amount of blood flow (25T167: 20-23). Thus, Dr. Medinets drew the conclusion that Mrs. O'Grady could

not possibly have been suffering from a leak at the time that she saw Dr. Oberhand without suffering severe neurologic symptoms (25T180: 3-5). In all of his experiences, Dr. Medinets had never seen someone who could walk with a hemorrhage such as the one suffered by Mrs. O'Grady (25T180: 18-20).

Furthermore, he found it significant that Mrs. O'Grady's neck had been found to be supple during Dr. Oberhand's examination of March 7, 1983. He explained that one of the signs of subarachnoid hemorrhage is a rigid or stiff neck. This was not the case upon examination of Mrs. O'Grady (25T173: 5-6). Thus, he agreed with Dr. Oberhand's diagnosis that prior to March 31, Mrs. O'Grady was suffering from cervical arthritis as confirmed by his review of the cervical x-rays taken by her treating chiropractor, Dr. Franz (25T182: 1-15). Dr. Medinets concluded that even if a CAT scan had been taken prior to March 31, 1983, it would have failed to show any aneurysm. He testified that the aneurysm would have been too small to have been detected on a CAT scan (25T158: 13; 25T159: 8). In fact, the CAT scan taken on March 31, 1983 following the plaintiff's rupture, failed to show the aneurysm (25T154: 25; 25T155: 4). The aneurysm was only later confirmed by an arteriogram done on July 18, 1983 (25T166: 11-17). Even Mrs. O'Grady's own expert, Dr. Derby, admitted that plaintiff was a Class I patient *without* neurological signs up to the time that the aneurysm ruptured on March 31 (19T252: 15; 19T253: 2).

Kenneth Jacobson, M.D., a board certified internist with a subspecialty in cardiovascular disease, also testified on behalf of Dr. DiLallo. From his review of the medical records in this case, it was Dr. Jacobson's opinion that Mrs. O'Grady had a long history of headache problems and that, this was certainly a factor that a physician can consider in evaluating the patient (26T81: 22-25; 26T82: 1-4). He essentially agreed with Dr. Medinets that with a middle cerebral artery bleed, that one would expect to find

some neurological signs in the patient (26T85: 4-10). Following his review of the materials, it was his opinion that within a reasonable degree of medical probability, that the basis of Mrs. O'Grady's complaints of headaches prior to March 31, 1983 was either cervical arthritis or a sinus headache (26T90: 1-6).

With respect to the actions of Dr. DiLallo in this case, it was Dr. Jacobson's opinion that there was no obligation to do any follow up after receiving the letter of March 14, 1983 from Dr. Oberhand because it was not an urgent or compelling letter (26T58: 3-19). Further, assuming that Dr. DiLallo had called the patient and she did not have any complaints of headaches, it would have been Dr. DiLallo's obligation only to advise her that if her headache problems should come back, that she should call him (26T40:1-10). There would surely not have been any obligation on the part of Dr. DiLallo to inquire into the details surrounding the headaches which are referred to in the letter of March 14, 1983 (26T40: 11-16).

Plaintiff's expert, Dr. Bennett Derby, testified that with respect to Dr. DiLallo's conduct, he should have immediately contacted the plaintiff to verify for himself if the complaints were severe and disabling. He should then have referred the plaintiff to a neurologist or neurosurgeon (19T197: 6-13). However, there was no question that in his mind that if Dr. DiLallo had received the letter and made the phone call to Mrs. O'Grady on March 16 or March 17, and asked her how her headaches were, she would have responded that her headaches were gone and she was being treated with a chiropractor (19T259: 1-10). Similar testimony was offered by Charles Duncan, M.D., a neurosurgeon who testified on Mrs. O'Grady's behalf (20T63:11-17).

The trial in this matter concluded on March 26, 1987. Following the court's charge to the jury there was no objection made by plaintiffs, nor was a request made for a "loss of chance"

charge as enunciated by the New Jersey Supreme Court in *Evers v. Dollinger*, 95 N.J. 399 (1984) (26T221: 12-16). During the course of the jury's deliberation, the jury requested that a portion of the deposition transcript of Dr. Oberhand be read back. After discussion with counsel, a passage was selected to be read to the jury. It should be noted that at no time did plaintiff's counsel ever object to the portion of Dr. Oberhand's deposition testimony that was read back to the jury in response to their question (26T243-248). In fact on the following morning, March 27, 1987, the jury requested that the passage be read to them once again in order to refresh their recollection. Mrs. O'Grady's counsel again voiced no objection to the passage which was read back to the jury (27T: 3-4).

On March 27, 1987 the jury returned a verdict that Dr. Oberhand and Dr. DiLallo were not professionally negligent. Since the jury concluded that neither defendant was negligent, they did not render a verdict on the issue of proximate cause.

On April 24, 1987 the plaintiffs moved for a new trial on the ground that the verdict was against the weight of the evidence. Plaintiff's motion was denied. On April 20, 1989 the Superior Court of New Jersey, Appellate Division, affirmed the judgment below. Plaintiff's petition for certification to the Supreme Court of New Jersey was denied on September 6, 1989.

At no time was a federal question ever adequately raised, preserved or passed upon in the state court below.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI WHERE THE PETITIONER HAS FAILED TO PROPERLY OR ADEQUATELY RAISE A CLAIM UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THE NEW JERSEY COURTS.

The petitioners invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257(a). That statute, as applied to the circumstances of this case,requires that in the state courts that the petitioners have "specially set up or claimed under the Constitution or the treaties or statutes or any commission held or authority exercised under the United States," that right which they now seek to have this court enforce.

In this regard, Rule 21.1(h) of the Rules of the Supreme Court specifically require the petitioner to specify in his or her statement of the case:

> The stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be reviewed were raised; the manner or method of raising them, and the way in which they were passed on by the court; such pertinent quotation of specific portions of the record of summary thereof with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on the Writ of Certiorari.

It should be noted initially that the petition for a writ of certiorari is procedurally defective in that petitioners have failed to include any of the information required by Rule 21.1(h) of the Rules of the Supreme Court of the United States as set forth above. There is no mention by the petitioners as to where in the proceedings, both at the trial level and in the Appellate Division, at which the federal questions sought to be reviewed were raised, the method or manner in raising them and the way in which they were passed upon the courts. Additionally, the petitioner's statement of the case fails to include any pertinent quotations of specific portions of the record which make specific reference to the places in the record where the matter appears, as will show that the federal question was timely and properly raised.

Notwithstanding this procedural defect, a canvassing of the record below does, in fact, reveal that there was a brief reference to a violation of petitioner's procedural due process rights which was included in a one paragraph discussion on the subject in the brief which was filed on the petitioner's behalf to the Appellate Division of the Superior Court of the State of New Jersey. However, nowhere in the opinion of the Appellate Division of the Superior Court of New Jersey is any federal question mentioned; let alone expressly passed upon (Petition for Writ of Certiorari at 3(a)-5(a))[1]

Thus, the issue before this court is the adequacy of the manner and presentation in which the federal question was raised below.

It is well settled that the jurisdiction of this court to reexamine a final judgment of the state court can arise only if the record as a whole shows expressly of by implication that a federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 497 (1981); *New York ex rel. Bryant v. Zimmerman*,

---

1. Petitioner's petition for certification to the Supreme Court of New Jersey was denied without opinion.

278 U.S. 63 (1928); *Oxley Stave Company v. Butler County*, 166 U.S. 648 (1897). This court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972).

In the *Webb* decision *supra*, this court considered the dismissal of a writ of certiorari for want of jurisdiction based upon the petitioner's inadequate presentation of a federal question in the state court's below. The *Webb* decision involved a custody dispute resulting in conflicting results of the states court of Florida and Georgia. *Id.* at 395. The mother's petition for writ of certiorari raised a federal question under the full faith and credit clause of Art. IV, Sec. I of the United States Constitution. *Id.* This court initially noted that nowhere in the opinion of the Georgia Supreme Court was there any mention of the federal question, nor was any federal issue discussed in the dissenting opinion of that court acknowledging that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this court can affirmatively show the contrary." *Citing Street v. New York*, 394 U.S. 576, 582 (1969); *see also, Fuller v. Oregon*, 417 U.S. 40, 50, n.11 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). The petitioner in the *Webb* decision rebutted the Court's assumption pointing to the fact that she did use the phrase "full faith and credit" on several occasions in the proceedings below. *Webb, supra*, at 396.

Additionally, this Court took note of the fact that the petitioner did not claim anywhere in her petition for a rehearing before the Georgia Supreme Court that the court's failure to reach the federal claim was error. *Id.* at 397, 398. Ultimately the *Webb* Court was not persuaded that petitioner had made an adequate presentation of her federal claim in the state courts below and

accordingly, petitioner's writ was dismissed for want of jurisdiction. *Id.* at 400. The Court's reasoning emphasized significant policy considerations underlying the statutory requirement that the federal challenge be adequately presented first in the state courts. Among these considerations was the Court's acknowledgement of principles of comity in our federal system.

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty which includes responding to attacks on state authority based on the federal law, or if the litigation is wholly private, construing and applying the applicable federal requirements.

Id. at 500.

Aside from principles of comity, the Court further acknowledged that there are practical reasons for insisting that federal issues be presented first in the state court system. These would include "the opportunity for the parties to develop the record below on the issue, the identification of independent state grounds that might pretermit the federal issue, and the adjudication of the federal claim in the state tribunal in the first instance which would obviate the need for plenary review in the Supreme Court of the United States." *Id.*

At the very minimum, this Court has cautioned that there should be no doubt from the record that the federal issue was adequately presented and passed upon below.

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented in the state courts, and that those courts were

> apprised of the nature or substance of the federal claim at that time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this court.

Id. at 502.

In the present case, aside from the procedural omissions in the petition for writ of certiorari as discussed *supra*, petitioners have only made the briefest reference to their constitutional claim in a one paragraph discussion embodied in the brief which was submitted to the Appellate Division of the Superior Court of the State of New Jersey. As in the *Webb* decision, nowhere in the opinion of the Appellate Division of the State of New Jersey is there any federal question mentioned, let alone expressly passed upon. Thus, it is to be assumed that this omission on the part of the Appellate Division of the State of New Jersey was due to want of proper presentation by the petitioner in the state courts. *Webb, supra*, at 496. The petitioners have failed to show the contrary.

It is also significant to note that petitioners never raised the federal question on petition for certification Supreme Court of the State of New Jersey, nor did petitioners claim in their petition for certiorari that either the Appellate Division or the New Jersey Supreme Court's failure to reach the federal claim was error.

Finally, principles of comity require that the parties be afforded the opportunity to develop the record in the state level necessary for adjudicating the issue in order to allow the state courts to exercise their authority. The record was obviously not

developed sufficiently for the state courts to determine the issue in the first instance. There is obviously no basis for this Court to determine whether or not the state court whose judgment is being reviewed had the opportunity to address the federal question that is now being asserted.

Petitioner's failure to adequately present their federal claims in the state courts below mandate denial of petitioner's writ of certification as this Court is without jurisdiction to hear the federal question.

II.

EVEN IF IT IS DETERMINED THAT THE FEDERAL QUESTION WAS ADEQUATELY PRESENTED BELOW, PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE TRIAL RECORD TAKEN AS A WHOLE DOES NOT DEMONSTRATE ANY VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

In general, standards of review dictate that this Court is to ignore harmless errors that do not affect the essential fairness of the trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). It is the duty of the reviewing court to consider the trial record as a whole and to ignore harmless errors including most constitutional violations. *United States v. Lane*, 474 U.S. 438 (1986).

It is submitted that in the present case, the trial record taken as a whole demonstrates overwhelming credible evidence to support the verdict of the jury. The focus of the petition for certiorari is two-fold: first, the court's charge to the jury, which was never objected to by the petitioner (26T221: 12-23), and sheer speculation with respect to so-called "juror misconduct" (Petitioner's Brief at 46).

A. The Court's Charge Did Not Constitute Plain Error.

Petitioners assert that the trial court erred by failing to include a "loss of chance" charge first enunciated by the New Jersey Supreme Court in *Evers v. Dollinger*, 95 N.J. 399 (1984). In *Evers*, the court held that "the plaintiff should be permitted to demonstrate within a reasonable degree of medical probability that . . . defendant's failure to make an accurate diagnosis and to have rendered proper treatment increased the [plaintiff's] risk of [injury] . . . and that such increased risk was a substantial factor in producing the condition from which plaintiff currently suffers." *Id.* at 417. Thus, the plaintiff must establish that the defendant had a duty "to try and save the plaintiff and that there was a substantial possibility that defendant's actions would save the plaintiff . . . " *Hake v. Manchester Township*, 98 N.J. 302, 311 (1985).

In the present case, petitioners assert that the negligent acts of commission and omission on behalf of the respondent doctors deprived Mrs. O'Grady of her chance to escape from "intercranial emergency" (Petitioner's Brief at 31).

The New Jersey Supreme Court has recognized that in the absence of evidence that a jury was substantially misled or seriously diverted from their careful consideration of the evidence presented, that a failure to include an *Evers* charge of increased risk of harm, justifying "the lost chance of survival" modification of traditional proximate cause causation does not constitute plain error. *Gaido v. Weiser*, 115 N.J. 310, 315 (1989).

The *Gaido* decision involved a medical malpractice action against a psychiatrist for the suicide of plaintiff's husband one day before his appointment with the psychiatrist. Plaintiff alleged that the defendant's refusal to see the decedent prior to his scheduled appoint was negligence causing her husband's death.

The defendant alleged that even if he was negligent, his conduct was not the proximate cause of decedent's death. *Id.* at 311-312. The Court charged the jury employing a standard proximate cause charge. The plaintiff never requested, nor did the Court consider a "lost change exception." The jury returned a verdict that the defendant was negligent, but that his negligence was not the proximate cause of the decedent's death. *Id.* 312.

On appeal, the dissenting judge found that the factual scenario of the case fell within the *Evers* theory of increased risk of harm, thereby justifying a "lost change of survival" charge.

On appeal to the Supreme Court, this case was affirmed. The concurring opinion recognized that while a proper charge on proximate cause would have incorporated the *Evers* doctrine, that it was not clear that "substantial justice" had not been done as a result of the erroneous action. *Id.* 314-315.

> In this case none of the parties perceived the issues as implicating the increased risk-of-harm doctrine . . . , the plaintiff did not ask for such a charge and did not object to the jury charge based on traditional definitions of proximate causation and, understandably, in the circumstances, the trial court did not, on its own, define proximate cause in terms suggested by *Evers*. These are strong indications that the presentation of the case to the jury was not considered by those closest to the litigation to be misleading.
>
> Moreover, it does not appear that the jury was substantially mislead or seriously diverted from a careful consideration of the critical evidence and the ultimate issues. It had a full presentation of the evidence that was further explained and amplified by counsel's summations.

Id.

Thus, the Supreme Court of New Jersey failed to conclude that the error by the trial court constituted plain error requiring reversal. *Id.* at 316.

In the present case, as in *Gaido*, it is significant that the trial court never considered charging the jury on the definition of proximate cause using the *Evers* standard and petitioners never asked for this type of charge. It is also significant that petitioners did not object to the jury charge based on traditional definitions of proximate cause and the trial court did not, on its own, define proximate cause in terms suggested by *Evers*. Specifically, the court stated:

> Now you have just heard me use the term proximate cause. By proximate cause it means that the negligence of the defendant in this case, either or both doctors, was an efficient cause of the condition. That is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the condition about. And you have to make that finding as to whether or not this condition, what happened on March 31, is a failure of the doctors. If you find there is a deviation, whether or not that brought about the condition, it would have been prevented, is one of the facts.

(26T198: 10-25).

Here, the jury was asked to consider the negligence of the defendant physicians in terms of their failure to provide adequate medical care, and further, that such negligence need be found in the event that it was a substantial factor in bringing the condition about.

Additionally, the jury heard the testimony of three experts on behalf of petitioners who fully articulated their opinions with respect to the negligence and proximate cause, which was further explained and amplified by counsel's summation. The failure of petitioners to request an *Evers* charge indicates that petitioners did not consider the court's charge to be in any way misleading or confusing. Thus, it cannot be concluded that the jury's ultimate determination constitutes an unjust result under the circumstances sufficient to satisfy the strict standard of the plain error rule, nor can it be said that the jury was substantially misled in this regard. *See* New Jersey Court Rule R. 1:7-2; and R. 2:10-2.

It is also significant to note that in this case the jury returned a verdict of no negligence in favor of both respondent physicians without ever having to reach the issue of proximate cause under its traditional definition. Thus, the petitioner cannot be heard to complain that the failure to incorporate the *Evers* charge resulted in jury mistake.

Next, petitioner takes the position that the trial court erred in its submission of a standard negligence charge as to Dr. DiLallo's negligence (Petitioner's Brief at 32-35). To begin with, the question of vicarious responsibility or *respondeat superior* was not even a part of the case below. This resulted from petitioner's voluntary dismissal of Dr. DiLallo's office employees, Phyllis LaFlamme, R.N., Mary C. Major and Mary Ann Hamburger *prior* to the trial in this matter. The sole issue which was before the court was limited to whether or not Dr. DiLallo had any duty to follow up on the letter which he received from Dr. Oberhand, assuming that he saw the letter. This was the primary focus of petitioner's inquiry to each of the expert witnesses at the time of trial. Petitioner's expert Charles C. Duncan, M.D. was questioned as follows:

> Q. With that background, if Dr. DiLallo had gotten a letter described as this letter describes severe disabling headaches, the location of the headaches, and the fact that it was something that Dr. Oberhand was able to clearly identify as being outside his area of specialty, what would have been the standard of practice for Dr. DiLallo to have followed when he got the letter?

(20T63: 4-10).

The inquiry of petitioner's expert Roger Miles Rose, M.D. was as follows:

> Q. That this letter, assuming for a second that he would have read it, when the letter indicates that the headache for which this patient is being referred to him for are severe, that they are disabling, that they are outside of the specialty of the physician who is sending the case in, what was the standard of practice that he would have been required to follow upon receipt of that letter?

(20T147: 14-20).

Finally, the following question was posed to petitioner's expert Bennett M. Derby, M.D.:

> Q. When Dr. DiLallo got that letter, we know that he didn't read it, we know it was placed in the file by somebody within his office, what would have been the standard of practice controlling his conduct with receipt of that letter and the information contained in there?

(19T196: 25; 19T197: 1-5).

In response, petitioners elicited from each expert that the appropriate standard of care for Dr. DiLallo would have been to refer the patient for appropriate evaluation had he read Dr. Oberhand's letter (19T197: 6-13; 20T63: 11-17; 20T149: 14-24).

Each defense expert testified that there was nothing urgent or emergent in the substance of the letter of March 14, 1983, and that had a call been made to the patient, there was no requirement under the circumstances to follow up with that patient if she no longer complained of headaches (25T183: 7-20; 26T40: 1-10).

Thus, the criticism which was directed against Dr. DiLallo had to do with whether or not he had an affirmative duty to act upon the contents of the letter assuming that the letter was seen. This question of "duty" is at the heart of a negligence charge in a medical malpractice context. *See Schueler v. Strelinger*, 43 N.J. 330 (1964); *Carbone v. Warburton*, 22 N.J. Super. 5 (App. Div. 1952), *aff'd*, 11 N.J. 418 (1953). Under the circumstances of the facts of this case and the testimony as it was elicited at trial, it was appropriate and warranted for the court to give a standard negligence charge (26T191-8 to 191-9), and to propound a jury interrogatory as to Dr. DiLallo's negligence (26T200-19, 21).

Once again, petitioner did not object to the propriety of the charge as directed to Dr. DiLallo at the time of trial, nor would it have been appropriate for the court to enter a directed verdict as to Dr. DiLallo's vicarious responsibility for the actions of his employees since the employees were not parties at the time of trial. Thus, the court's charge adequately addressed the questions raised by the evidence and did not constitute plain error.

B. It Is Sheer Conjecture for Petitioners to Suggest That the Verdict Was Based on Extraneous Evidence, Confusion and/or Juror Misconduct.

It is sheer conjecture for petitioners to argue that the jury erroneously relied upon extraneous information not in evidence in order to reach its verdict. In this regard, petitioners speculate "that the jury concluded (without evidence) that Mrs. O'Grady's headache was intermittent and then further concluded (without evidence) that intermittent headache and prodromal bleeding are mutually inconsistent" (Petitioner's Brief at 45). Petitioners base this statement on the supposition that an incorrect passage of Dr. Oberhand's deposition transcript was read back to the jury during deliberations (Petitioner's Brief at 42).

Petitioners seemingly dismiss the jury's consideration of all other available evidence presented, *see* Point C, *infra*, aside from the reading of Dr. Oberhand's deposition testimony in arriving at the verdict. With respect to the passage which was selected to be read back to the jury, there was more than ample opportunity for petitioners to object to this passage. No objection was made by petitioner's counsel on either March 26, 1987 or March 27, 1987 when the passage was reread to refresh the jury's recollection (26T243-248; 27T3-4).

Petitioners seemingly misconstrue the careful and deliberate consideration of the evidence by the jury as "clear and convincing circumstantial evidence of juror misconduct" (Petitioner's Brief at 416) by virtue of the fact that the jury asked for testimony to be reread. In New Jersey, our courts have clearly acknowledged and permitted jury requests for the rereading of testimony. *See State v. Lamb*, 134 N.J. Super. 575, 582 (App. Div. 1975), *aff'd*, 71 N.J. 545 (1976). In the *Lamb* decision, the court noted that " . . . generally where the testimony is readily available and in

the absence of some unusual circumstance, such a request should be granted." *Id.* at 582.

Ultimately, a jury's verdict is presumptively valid and the mere possibility of error is not enough to warrant a new trial. Appellate review of the trial court's actions is governed by New Jersey Court Rule 2:10-1 which provides in pertinent part that a trial court's ruling shall not be reversed unless "it clearly appears that there was a miscarriage of justice under the law." It is submitted that the entire record taken as a whole substantiated the jury's verdict. *Lamedola v. Mizell*, 115 N.J. Super. 514, 527 (Law Div. 1971).

C. Consideration of the Trial Record as a Whole Substantiates the Jury's Verdict in Favor of Dr. DiLallo and Did Not Result in Denial of Petitioner's Due Process Rights.

As set forth in the Counter-Statement of Facts, *supra*, petitioner's medical history was replete with a series of sinus-type headaches and complaints. It was, therefore, reasonable for the jury to conclude that Mrs. O'Grady suffered a spontaneous ruptured aneurysm on March 31, 1983, and that Dr. DiLallo and Dr. Oberhand were not negligent.

The testimony of Dr. Paul Franz in this respect was particularly telling. Dr. Franz was Mrs. O'Grady's chiropractor. He first began treating her in October of 1982 (22T53: 1-2). On the history form that she filled out for his office she indicated that she was a frequent headache-sufferer. Specifically, she advised Dr. Franz that she suffered from headaches approximately two to three times a week for twenty years (24T58: 2-10). He then began treating her between November of 1982 and March of 1983 to correct subluxations found in the lower pelvic area, the dorsal

lumbar junction, the dorsal spine, the upper dorsal spine and the upper cervical spine and the neck (24T70: 1-9).

In January of 1983, she advised Dr. Franz that she was experiencing headaches again (24T73: 3-10). Two months later Mrs. O'Grady returned complaining that she hurt her neck during exercises. Dr. Franz examined Mrs. O'Grady and found subluxation compressions present from the cervical spine. She was complaining of neck pain at that time (24T74: 10-22). X-rays taken of her cervical spine revealed a degenerative joint disease. His clinical examination also indicated a spinal disorder (24T76: 15-25). Mrs. O'Grady was next seen on March 11, 1983. She was still complaining of some discomfort in her neck (24T78: 15-22). She then saw Dr. Franz four days later at which time she was once again complaining of headaches. Following this examination, he found the presence of a subluxation of the cervical spine which accounted for the complaints of pain which she was experiencing. Specifically, he found that she had an upper cervical subluxation of the occipital area which was at the top of the neck or base of the skull (24T80: 2-13). He performed a chiropractic manipulation on that day as well as on March 16, 1983. Her next visit was March 21, 1983. At that time she indicated that her headaches were gone (24T81: 22-25).

It was not a mere coincidence that Mrs. O'Grady's headaches receded following March 16, 1983. It was, in fact, the chiropractic manipulations which were providing her with relief. So-called sentinel or pilot bleeds surely do not respond to chiropractic manipulations. The jury was free to accept Dr. Franz' testimony as to the explanation of when Mrs. O'Grady's headaches improved. Our courts in New Jersey have consistently acknowledged that a jury may adopt so much of a witness' testimony as appears sound and reject all of it or adopt all of it. *Amaru v. Stratton*, 209 N.J. Super. 1, 20 (App. Div. 1985).

Petitioner's expert witness, Dr. Derby, testified that a pilot or sentinel bleed occurs in only fifty percent of the cases of ruptured aneurysms (19T181: 10-13). Dr. Duncan, another expert for petitioner, also agreed that there was a possible basis to attribute petitioner's headaches to her sinus problems (20T105: 13-21). Thus, the jury was presented with a very exacting and extremely plausible explanation for petitioner's symptoms between March 7, 1983 and March 14, 1983. Mrs. O'Grady was a chronic sinus headache sufferer who also happened to sustain a neck injury on March 2, 1983 which caused the pain which radiated to her forehead. Mrs. O'Grady's neck injury responded to chiropractic manipulations and her headache complaints were resolved by March 16, 1983.

With respect to Dr. DiLallo's conduct, even assuming that Dr. DiLallo would have called Mrs. O'Grady if he had seen Dr. Oberhand's letter of March 14, 1983, both defense experts, Drs. Medinets and Jacobson, testified that generally accepted standards of medical practice did not require him to make such a call (25T184: 15-24; 26T38: 9-19). Even Dr. Rose, one of petitioner's liability experts, stated unequivocally, that the letter in issue did not have any sense of urgency to it (20T169; 13-16), and that in an overwhelming number of cases, people who complain of headache pain radiating from the back to the front or from the front to the back, are not necessarily suffering a subarachnoid hemorrhage (20T178: 5-12). It was within the exclusive province of the jury to conclude that there would have been no deviation from accepted of medical practice had Dr. DiLallo read the letter and decided not to act upon it.

Perhaps more importantly, each defense expert testified that had a call been made to the petitioner, there would have been no requirement of the part of Dr. DiLallo to follow up with her if she had no complaints of headaches.

Dr. Franz testified that petitioner's headaches had completely abated following March 16, 1983 (24T81: 22-25). Assuming that Dr. Oberhand's letter was not received by Dr. DiLallo until March 17, 1983 or March 18, 1983, it was certainly reasonable for the jury to conclude that had he called her at that time, she would have advised him that her headaches were gone.

As both Drs. Medinets and Jacobson testified, there would have been no deviation from accepted standards of medical care and practice by Dr. DiLallo in not advising petitioner to come to his office for further evaluation or examination if she had no complaints of headaches or advised him that her headaches were gone (25T186: 7-20; 26T40: 1-10). Thus, there would have been no requirement for Dr. DiLallo to send Mrs. O'Grady for a CAT scan under the circumstances (25T187: 2-12; 26T41: 20-22).

Thus, it is clear that there was overwhelming evidence from which a jury could find no negligence on the part of Dr. DiLallo. Rather, Mrs. O'Grady was the unfortunate victim of a spontaneous ruptured aneurysm for which there was no warning. It is axiomatic that an unfortunate result does not necessarily bespeak professional negligence. *See Schueler, supra; Germann v. Matriss*, 55 N.J. 193 (1970). The jury in this case agreed. Its judgment should be given considerable respect without speculation as to the course of deliberations within the jury room. New Jersey Rule of Evidence Rule 41 specifically prohibits the admission of an inquiry challenging a verdict based on the effect of various events upon the mental processes of jurors. *Id.*

In this case the jury's determination was supported by ample if not overwhelming evidence in the record, and there is no basis for a determination that petitioners were denied due process of law. Accordingly, the petition for certiorari must be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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No. 89-1275

In The

Supreme Court of the United States

October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D., JOSEPH DiLALLO, M.D., PAUL R. FRANZ, D.C., PHYLLIS LaFLAMME, R.N., MARY C. MAJOR and MARY ANN HAMBURGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT ROBERT I. OBERHAND, M.D.

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QUESTION PRESENTED

Does the mere fact that the jury requested certain testimony to be read back imply that its verdict was speculative and consequently a violation of petitioners' right to procedural due process?

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APPENDIX

No. 89-1275

In The

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October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT ROBERT I. OBERHAND, M.D.

STATEMENT OF THE CASE

This is a case of alleged professional negligence. The issues

are confined solely to those involving state law. Respondent submits there is no basis to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

On March 31, 1983, petitioner Rosella O'Grady suffered a subarachnoid hemorrhage from a ruptured aneurysm of the right middle cerebral artery which left her paralyzed from the neck down. Petitioners brought suit against Dr. Robert Oberhand, an otolaryngologist, and Dr. Joseph DiLallo, a family practitioner, alleging generally a failure to properly diagnose headaches complained of by petitioner prior to the hemorrhage.[1] A jury verdict was rendered in favor of both respondents finding, in response to special interrogatories, that both were not professionally negligent. Thus, petitioners' assertion of negligence being "uncontested" as framed in the questions presented represents a gross distortion of the facts.

Dr. Bennett Derby, a neurologist, testified as one expert for petitioners. He explained, as did other witnesses, that an aneurysm is "a little bulge or out-pocketing on the wall of an artery," like a bubble on a tire tube (19T179:8-14).[2] He agreed with the expert for respondents, Dr. Howard Medinets, that an aneurysm was caused by a congenital defect in the wall of the artery. It was petitioners' theory through Dr. Derby and other experts that the ruptured aneurysm was preceded by a warning or sentinel bleed

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1. Petitioners also sued Dr. Paul Franz, a chiropractor, and Mary C. Major, Phyllis La Flamme and Mary Ann Hamburger, who were office employees of Dr. DiLallo. The complaint against Dr. Franz was dismissed on summary judgment prior to trial. Petitioners voluntarily dismissed their claims against the employees of respondent DiLallo prior to their appeal to the Superior Court of New Jersey, Appellate Division.

2. The citation "T" refers to the transcript of the trial. The prefix number refers to the date of the testimony. The suffix refers to the page, and then, where applicable, the line numbers.

on March 4, 1983, and that this bleed caused Mrs. O'Grady's headache (19T181:6-183:11). Both Dr. Derby and Dr. Charles Duncan, a neurosurgeon, testified that Dr. Oberhand was negligent for not referring Mrs. O'Grady for immediate neurological assessment (19T190:1-10, 20T52:21-53:4).

Respondent Oberhand undermined petitioners' case from more than one direction. Headaches, being such a common ailment, he denied negligence for failing to refer Mrs. O'Grady. Indeed, petitioner Frank O'Grady admitted that his wife had suffered from migraine headaches (19T132:16-13), and sinus headaches (19T133:4). He also conceded that she had injured her neck exercising on the 1st or 2nd of March (23T28:19-25) and that she had some history of arthritis (23T33:10-14). Respondent also challenged the allegation of professional negligence by attacking causation with an overwhelming amount of evidence, which would have permitted the jury to conclude that petitioner's headaches were most likely attributable to causes other than a sentinel bleed (which also compounded the difficulty of making an accurate diagnosis had there been a bleed). Finally, respondent contended that even if petitioner had been referred for neurological workup, it was unlikely that the aneurysm would have been detected.

Dr. Howard Medinets, a neurosurgeon, was called as an expert witness on behalf of Dr. Oberhand on the issue of causation. He testified that petitioner suffered a spontaneous subarachnoid and intracerebral hemorrhage from a congenital aneurysm of the middle cerebral artery at its first bifurcation (25T152:23-153:1). He explained that the middle cerebral artery is a major artery within the substance of the brain, and when it ruptures and bleeds into the substance of the brain, the intracerebral hemorrhage, because of the location has a devastating injury and effect (25T149:20-150:9). Dr. Medinets went on to explain that the subarachnoid hemorrhage had to occur on March 31, 1983 and

not earlier because a bleed in such a location is a disastrous occurrence. "It is a catastrophe, like an explosion inside of the head." The damage from this type of bleeding is necessarily very severe and the brain is damaged (25T167:2-15). The brain is damaged from the blood which is actually in the brain (25T167:16-17). "All of the evidence indicates that she did not have bleeding prior to 3/31." (25T170:8-9).

Respondent submitted further proof that even if petitioner had been referred for a neurological assessment, the aneurysm would not had been discovered. Dr. Derby gave the opinion that if petitioner had been referred to neurologist or neurosurgeon, he would have obtained a CAT scan of the head which would have shown the aneurysm (19T190:14-25). Dr. Medinets disagreed. He testified that the aneurysm was too small to have been detected on a CAT scan (25T158:13-159:8). Indeed, Dr. Medinets related that the CAT scan taken on March 31, 1983 after petitioner collapsed, failed to show the aneurysm (25T154:25-155:4). The aneurysm was only later confirmed through an arteriogram done on July 19, 1983 (25T166:11-17).

Mrs. O'Grady saw respondent Oberhand on only two occasions after her headaches began. Dr. Roger Miles Rose, a board-certified otolaryngologist, testified as an expert on behalf of petitioners. While Dr. Rose delivered an opinion that the care rendered by Dr. Oberhand on March 14th deviated from the accepted standard of medical care because he failed to refer the patient for evaluation by a neurologist or a neurosurgeon, he testified that the treatment which Dr. Oberhand gave on March 7th was appropriate for what he found (20T161:1-4). Thus, if believed, the jury had only the visit of March 14 to evaluate to determine the propriety of the treatment rendered by respondent. Moreover, Dr. Rose agreed that it was a matter of judgment in making a decision whether to treat, to refer the patient, or to determine whether it was an emergency (20T167:7-18). He also

related that it was a matter of judgment in evaluating a patient and how he presents himself with a complaint of headaches (20T168:8-169:3).

As part of their argument, petitioners claim that the trial court failed to properly charge the jury on the issue of causation, in particular failing to give a "loss of a chance" charge as set forth in *Evers v. Dollinger*, 471 A.2d 405, 95 N.J. 399 (1984). However, there was no objection by petitioners to the charge as given by the trial judge, and no request for an *Evers* charge[3] (26T221:12-16). Likewise, petitioners failed to object to any testimony which was read back in response to the requests of the jury (26T:243-248). Moreover, the trial judge invited the jury to request additional testimony if the passage selected was wrong (26T245:2-18).

As previously noted, the jury returned a verdict finding that both respondents were not professionally negligent. Since the jury concluded that neither respondent was negligent, they did not render a verdict on the issue of proximate cause.[4]

Petitioners moved for a new trial on the ground that the verdict was against the weight of the evidence. The court denied the motion and delivered an oral opinion from the bench. It stated in part:

I believe that the verdict is not against the weight of

---

3. Furthermore, petitioners did not claim the charge was in error on their appeal to the Superior Court, Appellate Division. The petitioners first raised this issue in the petition for certification to the N.J. Supreme Court at p. 16 where they conceded it had not been raised below and urged "plain error." *See* Point III herein.

4. The issues of negligence and causation were submitted as separate interrogatories to the jury.

> the evidence. I believe there is not a miscarriage of justice. I believe that this is an unfortunate situation where people — that the human body is a delicate mechanism that none of us truly understand, even doctors. [4/24T19:15-20; *see* Petitioners' Appendix at p. 14a.]

> The question is "Did he deviate from accepted standards of that profession? I find that the jury, had I been sitting on the jury, having listen to all the evidence I would have voted the same way the jury voted. I believe that the jury had all of the evidence. [4/24T18:19 24; *see* Petitioners' Appendix at p. 14a.]

> . . . Not only that, but the testimony was, which supports, more than supports, but had the Defendant, Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think he would have met that burden, had the burden been on the other side. [4/24T17:9-15; *see* Petitioners' Appendix at pp. 12a-13a.]

The record is devoid of any complaint by petitioners of a denial of their due process rights under the Fourteenth Amendment. Not only is the jury verdict supported by the evidence, it is a proper and just verdict which should not be disturbed by this Court.

SUMMARY OF ARGUMENT

The petition seeks review of a judgment of the Superior Court of New Jersey in favor of respondents in an action alleging professional negligence. Petitioners seek to invoke the jurisdiction

of this Court pursuant to 28 U.S.C. § 1257(a), claiming a violation of their right to procedural due process.

Respondent contends that the Court is without jurisdiction to grant the petition because petitioners failed to adequately raise their constitutional claims below. Although favored with an appeal as of right to the New Jersey Supreme Court for matters involving a question arising under the Constitution of the United States, petitioners elected to seek discretionary review by petitioning for certification which was denied. New Jersey Constitution, 1947, Article 6, § 5, ¶ 1. Thus, petitioners claims were not presented to the "highest court of a state" which is required under 28 U.S.C. § 1257(a) for this Court to exercise its jurisdiction. *Webb v. Webb,* 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981). Moreover, on their petition for certification to the New Jersey Supreme Court, petitioners failed to raise their constitutional claims. Additionally, neither of the appellate opinions below indicates that those courts actually decided the constitutional issues now alleged by petitioners. That petitioners failed to adequately raise their claims below can be inferred from their lack of compliance with this Court's Rule 21.1(h) which subjects the petition to possible denial under Rule 21.5.

Second, the petitioner does not set forth any "special and important reasons" for issuing a writ of certiorari. Rule 17 and *Rice v. Sioux City Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954).

Third, the judgment below is supported on independent and adequate state grounds. Namely, petitioners neglected to preserve their right to appellate review by failing to object to the charge, or the portions of testimony which were read back to the jury and of which they now complain. N.J. Court Rule 1:7-2.

Finally, the record fails to demonstrate any violation of

petitioners' right to due process. Petitioners' claims are speculative. The judgment was entered based upon the verdict of a jury which resolved conflicting facts bearing upon the issues of negligence and causation — issues plainly outside the criteria by which this Court exercises its discretionary jurisdiction. *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 26 (1954).

REASONS FOR DENYING THE WRIT

I.

THE COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI BECAUSE PETITIONERS FAILED TO ADEQUATELY RAISE THEIR CONSTITUTIONAL CLAIMS BELOW.

Petitioners allege jurisdiction under 28 U.S.C. § 1257(a). Jurisdiction is allegedly conferred by reason of a judgment ". . . rendered by the highest court of a State in which a decision could be had . . ." wherein ". . . any title, right, privilege, or immunity . . ." Petitioners ". . . have specially set up or claimed under the Constitution . . . of . . . the United States." Specifically, petitioners claim a violation of procedural due process under the Fourteenth Amendment.

A. Petitioners Failed to Appeal the Judgment to the New Jersey Supreme Court.

New Jersey has a three-tiered judicial system. Original jurisdiction throughout the State is vested in the Superior Court which is separated into "Divisions" including the Law and Appellate Divisions. New Jersey Constitution, 1947 (hereafter "Const."), Art. 6, § 3, ¶¶ 2 and 3. The within matter was originally venued in the Law Division. Appeals from final judgments in the Law Division may be taken as of right to the

second tier, Appellate Division. Const., Art. 6, § 5, ¶ 2 and N.J. Court Rule 2:2-3(a) (Appendix at 1a). The Supreme Court is the court of last resort. Const., Art. 6, § 2, ¶ 2 (Appendix at 1a).

Review of final judgments in the Supreme Court may be had either on direct appeal or certification as provided. Const., Art. 6, § 5, ¶ 1 provides:

> *1. Appeals to the Supreme Court*
>
> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the appellate division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> (b) In causes where there is a dissent in the Appellate Division of the Superior Court;
>
> (c) In capital causes;
>
> (d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the inferior courts; and
>
> (e) In such causes as may be provided by law.

N.J. Court Rule 2:2-1 tracks the state constitutional criteria:

> *2:2-1. Appeals to tha Supreme Court from Final Judgments*
>
> (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right:

> (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.
>
> (b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to *R.* 2:12.

Both the Constitution and Rule 2:2-l(a)(1) provide for an appeal "as of right" in cases "...involving a substantial[5] question arising under the Constitution of the United States...". Alternatively, a litigant may petition for certification, but review by the court is discretionary.[6] Where there is a proper basis for an appeal as of right, non-constitutional claims will also be considered. *Kligman v. Lautman,* 251 A.2d 745, 53 N.J. 517 (1969).

Although entitled to review "as a right" of their constitutional claims, petitioners failed to appeal the judgment of the Appellate

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5. While not expressly set forth in the Constitution, N.J. Court Rule 2:2-1(a)(1) includes a requirement that the constitutional question must be "substantial" for an appeal as of right. However, the substantiality requirement has nevertheless been construed has implicit in Article 6, § 5, ¶ 1. *Tidewater Oil Co. v. Mayor and Council of Carteret,* 209 A.2d 105, 44 N.J. 338 (1965).

6. The grounds for certification are set forth in N.J. Court Rule 2:12-4 at Appendix 2a. Generally, a question of "general public importance" or "special reasons" is required.

Division to the Supreme Court, but instead sought discretionary certification which was denied' (Petitioners' Appendix at 2a). Under these circumstances, respondent respectfully contends that this Court is without jurisdiction under 28 U.S.C. § 1257(a) since petitioners' claims were not presented to ". . . the highest court of [the] State in which a decision could be had . . .". *Webb v. Webb,* 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

B. Petitioners Failed to Adequately Raise Their Constitutional Claims in the State Courts.

Even if petitioners' request for certification to the New Jersey Supreme Court instead of direct appeal of the judgment could be viewed as adequate for the purpose of invoking this Court's jurisdiction under 28 U.S.C. § 1257(a), petitioners never raised their due process claim in their petition for certification. Petitioners' brief and reply brief in support of their petition for certification are simply devoid of any argument that they were denied procedural due process under the Fourteenth Amendment. While such a claim was tangentially raised on appeal to the Appellate Division,[8] it must be deemed to have been abandoned when petitioners sought review by the New Jersey Supreme Court.

Jurisdiction of this Court can arise ". . . only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb,* 451 U.S. 493, 496-497, 101 S. Ct. 1889, 1892, 68 L.

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7. While petitioners may have sought certification instead of directly appealing the judgment because of the "substantiality" requirement, it hardly behooves petitioners to advance such an argument here in view of this Court's criteria for granting certiorari.

8. Brief of Plaintiff-Appellants, Superior Court of New Jersey, Appellate Division, Point I(d) at p. 52.

Ed. 2d 392, 397 (1981); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S. Ct. 709, 711, 41 L. Ed. 1149 (1897).

Moreover, if respondent understands petitioners' argument that N.J. Court Rule 1:16-1 (Interviewing Jurors Subsequent to Trial), N.J. Evidence Rule 41 (Evidence to Test a Verdict) and N.J. Rule of Professional Conduct 3.5 (Lawyer Not to Influence Juror) somehow violate their right to due process, petitioners failed to mount any direct constitutional attack on those provisions in the state courts. In order to invoke this Court's appellate jurisdiction, an express challenge to the constitutionality of a state statute is required. *Mississippi Power v. Moore,* 487 U.S. ____, 108 S. Ct. 2428, 2437, 101 L. Ed. 2d 322, 337 (1988), n. 10 and *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 108 S. Ct. 896, 898, 99 L. Ed. 2d 75, 80 (1988), n. 4.[9] Since none was advanced, respondent contends that the Court is without jurisdiction.

C. Petitioners' Constitutional Claims Were Not Decided in the State Courts Below.

To invoke this Court's jurisdiction, the federal question must not only have been raised, but also decided by the state courts. *Cardinale v. Louisiana,* 394 U .S. 437, 438, 89 S. Ct. 1161, 1162, 22 L. Ed. 2d 398, 400 (1969). If not passed upon, this Court may assume that the judgment rests on an adequate nonfederal ground,[10] *Cardinale, supra,* and *Ellis v. Dixon,* 349 U.S. 458,

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9. Respondent realizes that petitioners have not appealed, but seek a writ of certiorari. The cases cited were decided prior to the 1988 amendment of 28 U.S.C. § 1257 which eliminated this Court's appellate jurisdiction from the state courts under the former § 1257(2). To the extent that petitioners challenge the constitutionality of the aforesaid state rules, respondent urges that those decisions are persuasive.

10. *Cf.,* Point III herein.

464, 75 S. Ct. 850, 854, 99 L. Ed. 1231, 1236 (1955), or that the omission is for want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York,* 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L. Ed. 2d 572, 579 (1969). Nothing in the proceedings below show that the state appellate courts actually decided the constitutional issues raised here by petitioners. The Appellate Division rendered a per curiam opinion which makes no mention of them, and the New Jersey Supreme Court merely issued an order denying the petition for certification (Petitioners' Appendix at 1a-5a).

D. The Petition is Procedurally Defective Because Petitioners Have Failed to Comply with Rule 21.1(h).

Petitioners' Statement of the Case is deficient under this Court's Rule 21.1(h). There is no specification by petitioners where the federal questions sought to be reviewed in this Court were raised, either in the trial or appellate courts. There are no ". . . pertinent quotations of specific portions of the record, or summary thereof . . ." to show that the federal questions were timely and properly raised so as to grant this Court jurisdiction to review the judgment. Under Rule 21.5, the Court may deny the petition for failure to comply.

II.

NO SPECIAL REASONS EXIST TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners jump to the conclusion that the jury verdict was the product of speculation based upon requests for certain testimony to be read back. They then color this alleged speculation "jury misconduct," and, in what can be only characterized as a quantum leap, argue that the jury violated their right to

procedural due process under the Fourteenth Amendment. In the only place where petitioners raised this unique theory below, they candidly admitted, "No case has been discovered in which a constitutional grievance has been laid at the feet of jurors themselves . . .".[11]

However, review on certiorari is not a matter of right, but of discretion, and is only granted when there are special and important reasons. Rule 17. Review on certiorari does not provide a normal appellate channel in any sense comparable to a writ of error. *Fay v. Noia,* 372 U.S. 391, 436, 83 S. Ct. 822, 847, 9 L. Ed. 2d 837, 867 (1963). While petitioners may have developed what they considered to be a novel constitutional theory, " 'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1954). Even where petitioner may raise a federal question "of substance," this Court does sit to satisfy a scholarly interest in such issues. *Rice, supra.* Certiorari is granted only where the case involves principles the settlement of which is important to the public as distinguished from the parties. *N.L.R.B. v. Pittsburgh Steamship Co.* 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479, 482 (1951).

The petition fails to satisfy, nor does it attempt to satisfy, any of the criteria typically considered by the court for granting certiorari. *Cf.,* Rule 17.1(b) and (c). While petitioners undoubtedly feel that the issues are of great concern to themselves, they in no way justify the expenditure of this Court's limited resources.

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11. Brief of Plaintiff-Appellants, Superior Court of New Jersey, Appellate Division, Point I(d) at p. 52.

III.

PETITIONERS' FAILURE TO OBJECT TO THE CHARGE OR THE PORTIONS OF TESTIMONY WHICH WERE READ BACK TO THE JURY CONSTITUTE AN INDEPENDENT AND ADEQUATE STATE GROUND TO SUPPORT THE JUDGMENT.

To the extent that the trial court's failure to charge "loss of a chance" under *Evers v. Dollinger,* 471 A.2d 405, 95 N.J. 399 (1984) and its alleged mistake in having the incorrect testimony read back to the jury even remotely imply some constitutional defect, petitioners have waived appellate review by failing to make appropriate and timely objections.[12] New Jersey follows the traditional rule which requires a timely objection to evidence or the court's charge in order to preserve the issue for appellate review. N.J. Court Rule 1:7-2 provides:

> For the purpose of reserving questions for review or appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which he desires it to take or his objection to the action taken and the grounds therefor. Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), no party may urge as error any portion of the charge to the jury or omissions therefrom unless he objects thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury. If a party has no

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12. Petitioners conceded in their petition for certification to the New Jersey Supreme Court at p. 16 that they made no objection to the charge, and urged "plain error."

> opportunity to object to a ruling, order or charge, the absence of an objection shall not thereafter prejudice him.

Obviously, the purpose of the rule is to give the court an opportunity to reconsider its rulings and correct any alleged errors. *Gluckauf v. Pine Lake Beach Club, Inc.*, 187 A.2d 357, 78 N.J. Super. 8, 18 (App. Div. 1963). Except in the case of "plain error" which is discretionary and ". . . should be sparingly employed," New Jersey appellate courts will not review matters which were not preserved below. *Ford v. Reichert*, 129 A.2d 439, 23 N.J. 429, 433 (1957). *See also, Gaido v. Weiser*, 545 A.2d 1350, 227 N.J. Super. 175 (App. Div. 1988), *aff'd*, 558 A.2d 845, 115 N.J. 310 (1989).

There was no objection by petitioners to the charge given by the trial judge below, and no request for a "loss of a chance" charge (26T221:12-16). To the same effect, petitioners failed to object to any testimony which was read back in response to the requests of the jury (26T243-248). Moreover, the trial judge invited the jury to request additional testimony if the passages selected were wrong (26T245:2-18). Thus, petitioners failure to make appropriate and timely objections in the trial court constitute an independent and adequate state ground for affirmance of the judgment by the courts below.

IV.

THE PETITION SHOULD BE DENIED BECAUSE THE RECORD DOES NOT DEMONSTRATE ANY VIOLATION OF PETITIONERS' RIGHT TO DUE PROCESS.

The judgment entered in this case did not turn upon a violation of petitioners' right to due process, but rather upon resolution by a jury of conflicting facts bearing upon the issues

of negligence and causation. As Mr. Justice Frankfurter stated in *McAllister v. United States,* 348 U.S. 19, 23, 75 S. Ct. 6, 9, 99 L. Ed. 26 (1954):

> . . . If there is any class of cases which plainly falls outside of the professed considerations by which this court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts becomes the bone of contention. [Concurring opinion]

Petitioners have latched onto the jury's request for the testimony of Dr. Oberhand concerning the continuity of headaches to imply a verdict based upon speculation which infers misconduct, which, in turn, is alleged to be a violation of procedural due process. But the record is replete with references to both "a headache" and "headaches" suffered by petitioner Rose O'Grady between March 2 and March 16, 1983. Petitioners' daughter testified to "very bad headaches." (19T22:14). Petitioner Frank O'Grady was questioned on direct about his wife's "headaches" and testified that they disappeared on March 16 (19T148:3-22). On the hypothetical question proposed to petitioners' expert, Dr. Duncan, reference was made to "headaches." (20T46:19, 20T47:3, 20T47:20). Dr. Duncan also agreed on cross examination that there was a possible basis to attribute petitioner's "headaches" to the sinus problem (20T105:13-21) and the testimony of Dr. Franz was laced with references to "headaches." (24T79:15-23, 24T81:21, 24T87:22-88:4, 24T105:6-25).

On cross examination, Dr. Oberhand referred to ". . . the plural headaches." (25T76:5-10). He testified that the petitioner's description of the headaches was, ". . . 'They're back again' type

of situation." In other words, similar to all the other headaches (25T81:6-16).

Clearly, the issue of whether petitioner had a single constant headache or a series of headaches, and the inferences to be drawn therefrom were questions for the jury and the only flawed reasoning concerning same is that which is incorporated in petitioners' argument. It is the petitioners, rather than the jury, who have engaged in speculation. *See* the opinion of the Superior Court, Appellate Division, Petitioners' Appendix at pp. 4a-5a. On petitioners' motion for a new trial, the trial judge remarked in his oral opinion denying the application that, not only would he have voted along with the jury to exonerate the respondent, but he felt the evidence was so strong, that respondent would have prevailed even if he had the burden of proof.

> . . . Not only that, but the testimony was, which support, more than supports, that had the Defendant Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think that he would have met that burden, had that burden had been on the other side. [4/24T17:9-15; Petitioners' Appendix at pp. 12a-13a]

The verdict of the jury is not only supported by adequate credible evidence in the record, it is right and should not be disturbed.

The remainder of petitioners' arguments concerning the adequacy of the court's charge to the jury, and in particular, its failure to charge "loss of a chance" pursuant to *Evers v. Dollinger*, *supra* and *Hake v. Manchester Township*, 486 A.2d 836, 98 N.J. 302 (1985), if not waived by petitioners for failing to object to the charge, raise issues solely of state law which this Court has no jurisdiction to review under 28 U.S.C. § 1257.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: Millburn, New Jersey
April 2, 1990

APPENDIX

New Jersey Constitution, 1947

Art. 6, § 5, ¶ 2:

2. Appeals to Appellate Division of Superior Court

2. Appeals may be taken to the Appellate Division of the Superior Court from the Law and Chancery Divisions of the Superior Court, and in such other causes as may be provided by law.

Art. 6, § 2, ¶ 2:

2. Supreme Court, appellate jurisdiction

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution.

New Jersey Court Rules

Rule 2:2-3 [Part]:

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by R. 2:21(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right.

Appendix

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts; . . .

Rule 2:.12-4:

2:12-4. Grounds for Certification

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

No. 89-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D.; JOSEPH DiLALLO, M.D.; PAUL R. FRANZ, D.C.; PHYLLIS LaFLAMME, R.N.; MARY C. MAJOR; and MARY ANN HAMBURGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

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and MARY ANN HAMBURGER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

STATEMENT OF THE CASE

"While petitioners undoubtedly feel that the issues are of great concern to themselves, they in no way justify the expenditure of this Court's limited

resources," so asserts Respondent Dr. Oberhand through his attorneys. Oberhand Brief in Opposition, at 14. Perhaps Dr. Oberhand means to suggest that Mrs. O'Grady's injuries are trivial, at least in the great scheme of things, and that Petitioners' perseverance in their search for justice exhibits inappropriate self-absorption. If so, Dr. Oberhand and his attorneys forget that courts exist so that people can have a forum where their grievances can be fairly and justly addressed.

The truth of the matter is that the consequences of Mrs. O'Grady's injuries, judged according to any scheme, are far from trivial, both for herself and her family. As a result of her subarachnoid hemorrhage, Mrs. O'Grady is a mute quadriplegic, confined to the hospital since her collapse on March 31, 1983, fully conscious with complete

intellectual and emotional presence, but able to communicate only through eye movement.

Petitioners contend that Mrs. O'Grady's headache was due to a prodromal bleed. But its origin is irrelevant. The intensity of Mrs. O'Grady's headache was so severe, the pain so terrible, the consequences of the condition which it portended so alarming, that Drs. Oberhand and DiLallo should have referred Mrs. O'Grady to a neurologist. Had they done so, the overwhelming chances are that, whether or not there was a prodromal bleed, Mrs. O'Grady's aneurysm would have been detected and treated by the neurologist before it ruptured, and her injury would have been averted.

Dr. DiLallo says that had he read Dr. Oberhand's letter, describing a headache Dr. DiLallo himself called

"alarming" (19T115-3 to -8; 26T11-12 to -19), and had he then called Mrs. O'Grady, that she would have told him the headache had disappeared. Dr. DiLallo claims he then would not have either asked Mrs. O'Grady to come into the office for an examination or referred her to a specialist. DiLallo Brief in Opposition, at 5. Dr. Oberhand claims he fulfilled his duty to Mrs. O'Grady by just looking at her posture and demeanor, without asking any questions about history. Id. at 3.

Prodromal headaches hurt so much because they are caused by leaking of blood from the aneurysm into the subarachnoid space surrounding the brain, causing a buildup of pressure. As the leaked blood is absorbed by the body over the course of time, pressure is reduced and the pain subsides. The next leak may rupture the aneurysm and

cause very great damage, as in Mrs. O'Grady's case. The fact that a "severe and disabling"[1] headache persists for a long time and then disappears is a bad sign indeed. Dr. DiLallo had a duty to know this. He should not say that the negligence of his servant in misfiling the letter was of no consequence. Dr. Oberhand had a duty to ask Mrs. O'Grady questions about her headache, not just to assume it was like the sinus headaches she had had before.

REASONS FOR GRANTING THE WRIT

I. THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

1. This Court Has Substantially Diminished Its Exemplary Guidance of State Civil Jury Practice, And Is About to

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1. Letter of March 14, 1983 from Dr. Oberhand to Dr. DiLallo -- introduced as plaintiffs' Exhibit 1 at 19T141-2, reprinted in Petitioners' Petition for a Writ, at 17a.

Withdraw Its Hand Completely

Trial by civil jury in our state courts is of importance in preserving the sense that citizens are actors, not just objects, in the process of government. For this reason this Court, has exerted the controlling influence of example over state practice.[2]

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2. In Colgrove v. Battin, 413 U.S. 149 (1973), the Court held juries of six persons proper in federal civil trials. Shortly afterward, the New Jersey State Constitution was amended to allow six person juries in all civil matters. See N.J. Const. of 1844, art. I, para. 7 (1844); N.J. Const. of 1947, art. I, para. 9 (1947); N.J. Const. art. I, para. 9 (as amended Nov. 6, 1973, effective Dec. 4, 1973); see also Rutledge v. Rutledge, 720 S.W.2d 633, 635 (Tex. Ct. App. 1986).

A similar course was followed as to unanimity. American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897), held the 7th Amendment to require a unanimous jury verdict in federal civil cases. Apodaca v. Oregon, 406 U.S. 404 (1972), held that the 14th Amendment does not require a unanimous jury verdict in state criminal cases, but the 6th Amendment requires a unanimous verdict in a federal prosecution. Many states have conformed their civil jury

In recent years, the number of such examples has diminished. This Court once considered sufficiency of evidence. See, e.g., Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 113 (1963). Today, a petition raising only that issue would have "little or no chance of being granted." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 220 (6th ed. 1986). So too, solicitude for integrity of the jury decisional process (Dairy Queen v. Wood, 369 U.S. 469, 472-73

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practice to Apodaca rather than American Publishing. See, e.g., State v. McKay, 280 Md. 558, 375 A.2d 228 (1977); Phillips v. Meadow Garden Hospital, 139 Ga. App. 541, 228 S.E.2d 714 (1976); Pitcher v. Lakes Amusement Co., 236 N.W.2d 333 (Iowa 1975); Moss v. State, 539 S.W.2d 936, 942 (Tex. Ct. App. 1976) People v. Miller, 121 Mich. App. 691, 329 N.W.2d 460, 461-62 (Ct. App. 1982).

(1962)) has been submerged in the technicalities of administrative estoppel (Parklane Hosiery Co. v. Shore, 439 U.S. 322, 334-36 (1979)).

Now, the guiding hand may well be withdrawn almost altogether; the Chief Justice has recently accepted the report of a distinguished committee recommending abolition of the diversity jurisdiction.[3] This time, it appears that this suggestion may finally be followed; if it is, much of ordinary civil jury litigation will pass from the federal system, and with it will go this Court's ability to use federal exemplars for the edification of state courts.

2. This Court Must Retain Some Means, Short of Incorporation, By Which to Exert Leadership Over Civil Jury Trials

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3. Committee to Study the Federal Courts, Report (1990).

The number and complexity of filings continues to afflict state court systems, the cost of administering the tort system is a deadlocked issue in the general political arena,[4] and state legislatures seek to escape difficult substantive questions by tinkering with the procedural incidents of jury trial.[5]

Even limited incorporation would require case by case line drawing that ought be avoided.[6] What is needed is a doctrinal device which leaves the states

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4. In New Jersey, all but the most highly rated drivers are insured by the Joint Underwriting Association (JUA), which has compiled a deficit approaching $3 billion. The most recently elected governor of New Jersey ran on the campaign slogan "The JUA is D.O.A."

5. Note, Reforming Tort Reform: Is There Substance to the Seventh Amendment?, 38 Cath. U. L. Rev. 737 (1989).

6. Cf., e.g., Pointer v. Texas, 380 U.S. 400 (1965); Green v. California, 399 U.S. 149 (1970).

free to abolish jury trial if they please, but which allows this Court to intervene to ensure that if a state chooses to retain trial by jury in civil matters, that trial will retain basic elements of fairness.

3. This Case of First Impression Can Provide the Means

Petitioners assert that the jurors in this matter, acting in the capacity of sworn (N.J.S.A. 2A:74-6), paid (N.J.S.A. 22A:1-1) officers of New Jersey's judicial branch, violated that oath by deciding the case on facts not in evidence, and so denied Petitioners due process of law under the Fourteenth Amendment. Undergirding that claim are two inferences of fact and two assertions of law.

a. Inferences of fact

Petitioners assert that the five questions asked by the jury on an extraneous subject just before rendering the verdict, taken with the fact that much of Respondent Dr. Oberhand's evidence was irrelevant and the fact that Respondent Dr. DiLallo was exonerated on a ground which he never contested,[7] support the inference that the jury's verdict was based on factors extraneous to the evidence. New Jersey courts have drawn the inference that a verdict is improper based on jury questions. Hacker v. Statman, 105 N.J.

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7. Respondent Dr. DiLallo takes the position here that he is not vicariously responsible for the negligence of his servants because Petitioners took a voluntary nonsuit against them before trial. DiLallo Brief in Opposition, at 19, 21. To the extent this is a claim that a servant is an indispensable party to an action in respondeat against the master, it is simply mistaken.

Super. 385, 392, 252 A.2d 406, 412 (App. Div. 1969). Petitioners ask this Court to find, at least arguendo, that the drawing of this inference is rationally possible.

The Petitioners next ask this Court to find, as a matter of fact, that the four traditional devices employed in New Jersey to prevent, detect and correct jury mistake or misconduct failed to do so in this case. Those devices are: (1) the basic requirement that evidence must be relevant, (2) the requirement that the charge be congruent to the law and the facts in evidence, (3) the rule the special verdicts must be based on grounds in issue at trial, and (4) the rule that the appellate court may make independent inquiry into sufficiency of the facts to support a verdict.

b. Assertions of law

By asking for a finding of fact that the provisions of New Jersey law designed as prophylaxis and cure for jury misconduct failed in this case, Petitioners lay the foundation for their claims of law. These are that they may impute their constitutional injury directly to the jury as state officers and that, absent any reasonable attempt by the state to prevent or correct or ameliorate that injury, remedy may be had in this Court.

c. Limitations on the remedy

The remedy Petitioners seek is an exceedingly narrow one. They would have this Court entertain a claim of constitutionally improper jury misconduct only if (a) all the evidence of such misconduct was clear, (b) the

evidence was also clear that all state safeguards against misconduct had failed, and (c) the state courts had made no good faith attempt to apply those safeguards.

II. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

1. The Federal Question Was Timely Raised and Fully Articulated Below

a. Supreme Court Rule 14.1(h)

The Respondents complain of failure to conform to the provisions of Supreme Court Rule 14.1(h)[8] in not "making pertinent quotation of specific portions of the record" showing the federal question raised below. The relevant portion of Petitioners' brief in the Superior Court of New Jersey, Appellate

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8. Respondents mistakenly cite Rule 21.1(h). Oberhand Brief in Opposition, at 13; DiLallo Brief in Opposition, at 11.

Division is quoted in the Appendix to this reply.

b. Petitioners may not be denied the writ because they did not raise their constitutional claim in the trial court

In New Jersey practice, a new trial motion must be made within 10 days of the return of the verdict.[9] The constitutional basis for Petitioners' objection to the verdict did not become apparent until after close scrutiny of that transcript, which was not furnished until 11 months after trial. It would be manifestly inappropriate to refuse Petitioners the writ for failure to

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9. A motion for a new trial shall be served not later than 10 days after the court's conclusions are announced in non-jury actions or after the return of the verdict of the jury.

New Jersey Court Rule 4:49-1(b).

raise their federal claim during the 10-day post-verdict period.

2. The Federal Question Was Determined in the Highest Court of the State in Which Judgment Could Be Had

Petitioners seek a writ addressed to the Appellate Division of the Superior Court; their petition for certification from the Supreme Court of New Jersey was denied. Sullivan v. Texas, 207 U.S. 416, 422 (1908); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678 n.1 (1968). Respondents contest this process in an argument which appears to have two branches: The first is that the petition for certification was a hearing on the merits and its denial an adjudication of those merits; the second is that even if the petition was not a full hearing and adjudication, Petitioners nevertheless

failed the standard of Section 1257 because their constitutional claim was not presented to the Supreme Court of New Jersey. The first of these contentions is wrong on the law; the second wrong on the facts. Denial by the New Jersey Supreme Court has precisely the content of denial of a petition for certiorari here: It says nothing about the judgment below.[10] The Petitioners' constitutional contentions

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10. A petition for certification shall be granted on the affirmative vote of 3 or more justices. Upon final determination of a petition for certification, unless the Supreme Court otherwise orders, the clerk shall enter forthwith an order granting or denying the certification in accordance with the Supreme Court's determination and shall mail true copies thereof to the clerk of the court below and to the parties or their attorneys.

New Jersey Court Rule 2:12-10.

were before the Supreme Court of New Jersey; local practice requires that the briefs in the Appellate Division be submitted with the petition for certification.[11] If certification is granted, Petitioners' entire case is before the court.[12]

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11. Within 10 days after filing of the notice of petition for certification, 2 copies of the petition shall be served on each opposing party and 9 copies thereof together with 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court.

New Jersey Court Rule 2:12-7(b).

12. If certification is granted, the matter shall be deemed pending on appeal in the Supreme Court and the petitioner's entire case shall be before the Supreme Court for review unless the Supreme Court otherwise orders on its own motion or on the motion of a party which shall be included in the petition or in the respondent's brief in answer thereto.

New Jersey Court Rule 2:12-11.

Respondents then argue that Petitioners waived their federal claim by not taking a direct appeal to that court. The New Jersey Supreme Court so narrowly guards the route of direct appeal that the court itself counsels that it not be taken. "Whenever the right to appeal is not clear, the proposed appellant should petition for certification, setting forth fully the basis of his claim to appeal as of right, together with such other reasons, if any, as he may feel entitle him to a further review." Deerfield Estates, Inc. v. Township of East Brunswick, 60 N.J. 115, 120, 286 A.2d 498, 501 (1972). Petitioners sought certification without simultaneously appealing directly and filed with the New Jersey Supreme Court

an Appellate Division brief containing their constitutional claims. Their petition was rejected, as it would certainly have been rejected if conjoined to a direct appeal. To penalize them for not formally seeking that remedy would exalt form over substance.

Respectfully submitted,

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APPENDIX

Excerpt from Brief of Petitioners in the Superior Court of New Jersey, Appellate Division

D. The Jury's Misconduct Denied Plaintiffs Fundamental Due Process: They Had No Opportunity to Offer Proof on the Issue that Decided their Case.

Because plaintiffs do not here assert plain error, and because the jury's questions here open a rare window into its ratio decidendi, plaintiffs make a claim which they believe to be of first impression: This jury violated their rights to procedural due process under N.J. Const. art. 1, sec. 1, and U.S. Const. amend. XIV. No case has been discovered in which a constitutional grievance has been laid at the feet of jurors themselves, acting as a constituent part of state adjudicatory process. But the fundamental procedural due process right to a fair hearing embraces the right to present evidence, Morgan v. United

States, 304 U.S. 1, 18 (1938), and this jury, by assuming facts instead of deciding them on the proofs before it, and by violating the laws of logic in reasoning from that fact, effectively denied the plaintiffs notice and opportunity to be heard and present evidence. Consequently, damaging and prejudicial materials were deliberated by the jury. United States ex. rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973). The plaintiffs were "entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries." State v. Orecchio, 16 N.J. 125, 129 (1954); State v. Jackson, 43 N.J. 148 (1964); State v. Marchand, 31 N.J. 223 (1959); State v. Zwillman, 112 N.J. Super. 6 (App. Div. 1970). The jury's unconstitutional verdict denied

that right and must be set aside.